120—534

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~555~~ 138

LUCY W. FLETCHER ET AL., PLAINTIFFS IN ERROR,

vs

NATHAN FULLER, IN HIS OWN RIGHT AND AS TRUSTEE FOR TRUMAN B. FULLER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED OCTOBER 21, 1885.

SUPREME COURT OF THE UNITED STATES.

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No. 395.

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1 UNITED STATES OF AMERICA, }
District of Rhode Island, } *ss:*

Circuit Court of the United States. November Term, 1874.

NATHAN FULLER, for Self and as Trustee, }
v. } No. 838.
LUCY W. FLETCHER *et al.* }

Be it remembered that at the November term of the circuit court of the United States for the first circuit and district of Rhode Island the following writ and declaration were filed:

Writ. Issued Oct. 26, 1874.

DISTRICT OF RHODE ISLAND, *ss:*

The President of the United States of America to the marshal of said district, or to his deputy, Greeting:

We command you to summon Lucy W. Fletcher, widow, and Ferdinand S. Eddy, machinist, alias gentleman, and Amy Eddy, wife of said Ferdinand S. Eddy, all citizens of the city and county of Providence and State of Rhode Island, within said district, and of the United States, to answer the complaint of Nathan Fuller, a citizen of Haddam, in the county of ——— and State of Connecti-
cut, and of the United States, in his own right and as trustee
2 for Truman Fuller and others, at the next circuit court to be holden at Providence, within and for the district of Rhode Island, on the sixteenth day of November next ensuing the date hereof (the fifteenth day of November, 1874, falling on Sunday), in an action of trespass and ejectment, for that the defendants with force and arms have broken and entered the plaintiff's close, situated on the westerly side of Broad street, in the village of Central Falls, in the town of Lincoln, in the county of Providence and State of Rhode Island, and ejected the plaintiff therefrom, as by declaration to be filed in court will be fully set forth, to the damage of the plaintiff one thousand dollars.

Hereof fail not and make true return of this writ with your doings thereon.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of October, in the year 1874.

HENRY PITMAN, *Clerk.*

Marshal's Return.

DISTRICT OF RHODE ISLAND, *ss:*

PROVIDENCE, *October 26th*, 1874.

I have this day served this writ of summons on Lucy W. Fletcher, widow, and upon Ferdinand S. Eddy, and upon Amy Eddy, wife of said Ferdinand, by reading the same in the presence and hear-

ing of each of them and by delivering to each a true and attested copy of this writ.

WM. KNOWLES,
Deputy U. S. Marshal.

[Fees:]

Service	6 00
Copies	1 50
Travel	36
	$7 86

3 *Declaration. Filed November 4th*, 1874.

Nathan Fuller, of Haddam, in the county of —— and State of Connecticut, a citizen of the State of Connecticut and of the United States, in his own right and as trustee of Truman B. Fuller and others, complains of Lucy W. Fletcher, widow; Ferdinand S. Eddy, machinist, alias gentleman, and Amy Eddy, wife of said Ferdinand S., all of the city and county of Providence, within said district of Rhode Island, and all citizens of the State of Rhode Island and of the United States, summoned by the marshal in an action of trespass and ejectment, for that the defendants, at Lincoln, in said county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, with force and arms broke and entered the plaintiff's close, situate in said Lincoln, in the village of Central Falls, and bounded and described as follows, viz: Beginning at a point about ninety-seven (97) feet southerly from the southerly line of Cowden street, so called, on the westerly side of Broad street, and extending thence south 89¾° west three hundred (300) feet; thence southerly at right angles three hundred (300) feet; thence easterly at right angles on a direct line to said Broad street, and thence northerly, bounding easterly, on said Broad street to the first-mentioned bound; and, being so entered, ejected and expelled the plaintiff therefrom, and still holds him out against the peace and
4 dignity of the State and to the damage of the plaintiff one thousand dollars.

And also for that the defendants, at Lincoln, in said county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, with force and arms, broke and entered the plaintiff's certain other close, situate in the village of Central Falls, in said Lincoln, and bounded and described as follows, viz: Beginning at a point on the westerly side of Broad street, so called, about ninety-seven (97) feet southerly from the southerly line of Cowden street, so called, and extending thence south 89¾° (eighty-nine and three-fourth degrees) west ten hundred and seventy-five (1,075) feet to a stone bound; thence south 12¾° *degrees* (twelve and three-quarter degrees) east nine hundred and twelve (912) feet; thence north 75¾° (seventy-five and three-quarter degrees) east three hundred and fifty-nine (359) feet; thence north 8½° (eight and one-half degrees) east one hundred and sixty-six and three-tenths ($166\frac{3}{10}$) feet; thence south 81½° (eighty-one and one-half degrees) east four hundred (400)

feet to a stone bound on the westerly side of Broad street; thence north 9¼° (nine and one-quarter degrees) east, bounding easterly on said Broad street seven hundred and seventeen (717) feet to the first-mentioned bound, said close being known as the Ledge lot; and, being so entered, then and there ejected and expelled the plaintiff therefrom, and still holds him out against the peace and dignity of the State and to the damage of the plaintiff one thousand dollars, as laid in his writ, dated October 26th, A. D. 1874.

Wherefore he sues.

5 By his attorneys, T. A. JENCKES,
J. C. COLLINS,
L. SCOTT, AND
E. C. MOWRY.

And also for that the defendants, at Lincoln, in the county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, with force and arms broke and entered a certain other close, of which said close the plaintiff was and is the lawful owner in fee-simple of twenty-seven twenty-eighths, undivided parts, situated in said Lincoln, in the village of Central Falls, and bounded and described as follows, viz: Commencing at a point twenty-six and one-half (26½) rods northerly on the northwest corner of Andrew Jenckes' estate, bounding westerly on land formerly of Welcome A. Phillips, north 13¾° west 771 feet to a stone bound; thence south 89¼° east 1,074.58 feet to the westerly line of Broad street, so called; thence south 9¼° west 717.40 feet; thence north 81¼° west 400 feet; thence south 8½° west 108 feet, more or less; thence north 89¼° west 408 feet, more or less, to the point of beginning; and, being so entered, then and there ejected and expelled the plaintiff therefrom, and still holds him out, against the peace and dignity of the State, and to the damage of the plaintiff one thousand dollars.

And also for that the defendant, at Lincoln, in the county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, with force and arms broke and entered a certain other close, of which said close the plaintiff was and is the lawful
6 owner in fee-simple of twenty-seven twenty-eighth- undivided parts, situate in said Lincoln, in the village of Central Falls, and bounded and described as follows, viz: Commencing at a point 26½ rods northerly of the northwest corner of Andrew Jenckes' estate, bounding westerly on land formerly of Welcome A. Phillips; thence north 13¾° west 771 to a stone bound; thence south 89¼° east 1,074.58 feet to the westerly line of Broad street, so called; thence south 9¼° east 717.40 feet; thence north 81¼° west 400 feet; thence at a small angle as the fence now runs, 221.47 feet to a corner; thence south 68 feet, more or less, to a corner; thence north 89¼° west 154 feet to the point of beginning; and, being so entered, then and there ejected and expelled the plaintiff therefrom, and still holds him out, against the peace and dignity of the State, and to the damage of the

plaintiff one thousand dollars, as laid in his writ bearing date the 26th day of October, A. D. 1874.

Wherefore he sues.

By his attorneys, ELISHA C. MOWRY,
LIVINGSTON SCOTT,
JAMES C. COLLINS.

7 *Amendment to Declaration. Filed Dec.* 15, 1882.

And now comes the plaintiff, and, by the leave of the court first had and obtained, amends his declaration by adding the following counts:

And also for that the plaintiff, at said Lincoln, in said county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, was seized and possessed in his demisne, as of fee in his right and as trustee, of twenty-seven twenty-eighth- undivided parts of a certain tract of land in said Lincoln, containing about —— acres, and bounded as follows: Commencing at a point twenty-six and one-half (26½) rods northerly of the northwest corner of Andrew Jenks' estate, on the easterly line of land formerly belonging to Welcome A. Phillips; thence running along the said easterly line of said Phillips' land north 13¾° west seven hundred and seventy-one (771) feet to a stone bound; thence running south 89¼° east nine hundred and seventy-four and fifty-eight one-hundredths (974.58) feet; thence running southerly one hundred feet to a corner; thence running northeasterly one hundred (100) feet to the westerly line of Broad street, so called, at a point thirty-eight (38) — southerly from the intersection of the westerly line of said Broad street with the southerly line of land formerly belonging to Jason Cowden; thence running south 9¼° west six hundred and seventy-nine and $\frac{40}{100}$ (679.40) feet along the westerly line of said Broad street; thence running north 81¼° west four hundred (400) feet; thence run-

8 ning south 8½° west one hundred and eight (108) feet more or less; thence running north 89¼° west four hundred and eight (408) feet, more or less, to the point of beginning. And the plaintiff being so seized and possessed of the said tract, the defendants afterwards, at said Lincoln, on the day and year aforesaid, with force and arms entered into the said tract of land and removed and expelled the plaintiff therefrom, and the plaintiff thereof ejected, disseized, and dispossessed, and have ever since withheld, and still withhold, from the plaintiff the possession thereof, to the damage of the plaintiff one thousand dollars, as laid in his writ, bearing date October 26th, A. D. 1874.

Also for that the plaintiff, as said Lincoln, in said county of Providence and district of Rhode Island, on the 25th day of October, A. D. 1874, was seized and possessed in his demisne, as of fee in his own right and as trustee, of twenty-seven twenty-eighths undivided parts of a certain other tract of land in said Lincoln, containing about —— acres, and bounded as follows: Commencing at a point twenty-six and one half (26½) rods northerly of the northwest corner of Andrew Jenks' estate, on the easterly line of land formerly be-

longing to Welcome A. Phillips; thence running along the said easterly line of said Phillips' land north 13¾° west seven hundred and seventy-one (771) feet to a stone bound; thence running south 89¼° east nine hundred and seventy-four and $\frac{58}{100}$ (974.58) feet; thence running southerly one hundred (100) feet to a corner; thence running northeasterly one hundred (1000) feet to the westerly line of Broad street, so called, at a point thirty-eight (38) feet southerly from the
9 intersection of the westerly line of said Broad street with the southerly line of land formerly belonging to Jason Cowden; thence running south 9¼° west six hundred and seventy-nine and $\frac{40}{100}$ (679.40) feet along the westerly line of said Broad street; thence running north 81¼° west four hundred (400) feet; thence, at a small angle as the fence now runs, two hundred and twenty-one and $\frac{47}{100}$ (221.47) feet to a corner: thence running southerly as the fence now runs sixty-eight (68) feet, more or less, to a corner; thence running north 89¼° west one hundred and fifty four feet to the point of beginning, and the plaintiff being so seized and possessed of the said tract. The defendants afterwards, at said Lincoln, on the day and year aforesaid, with force and arms entered into the said tract of land and removed and expelled the plaintiff therefrom, and the plaintiff thereof ejected, disseized, and dispossessed, and have ever since withheld, and still withhold, from the plaintiff the possession thereof, to the damage of the plaintiff one thousand dollars, as laid in his writ, bearing date October 26th, A. D. 1874.

Wherefore he sues.

By his attorneys, LIVINGSTON SCOTT,
E. C. MOWRY,
JAMES C. COLLINS.

10 *Defendants' Pleas. Filed Nov. 20th*, 1878.

And the said defendants come and defend the force and injury, when, &c., and say that they are not guilty of the said supposed trespasses and ejectments above laid to their charge, or of any part thereof, in manner and form as the said plaintiffs hath above thereof complained against them; and of this the said defendants put themselves upon the country.

By their attorneys, SAYLES & GREENE.

11 And for a further plea, by leave of the court obtained, they, the said defendants, say that the plaintiff ought not to have or maintain his said action against them, because they say that they, the said defendants, or those from whom they derive their title, either by themselves or their tenants or lessees, have been for the space of twenty years next prior to the date of the writ in said action in the uninterrupted, quiet, peaceable, and actual seizen and possession of said premises in said declaration set forth and described, for and during the said time claiming the same as their proper, sole, and rightful estate in fee-simple, and this they are ready to verify.

Wherefore, and by reason of the statute of said State of Rhode Island in such cases made and provided, they pray judgment if the

said plaintiff ought to have or maintain his aforesaid action thereof against them and for their costs.

By their attorneys, SAYLES & GREENE.

Replications. Filed Sept. 7th, 1880.

And the said plaintiff, as to the plea of the said defendants by them first above pleaded and whereof they have put themselves upon the country, doth the like.

By his attorneys, JAMES C. COLLINS,
LIVINGSTON SCOTT,
ELISHA C. MOWRY.

12 And the said plaintiff, as to the plea of the said defendants by them secondly above pleaded, saith that the said plaintiff, by reason of anything by the said defendants in the said plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendants, because he says that neither the defendants nor those from whom they derive their title, neither by themselves, their tenants, or lessees, have been for the space of twenty years next prior to the date of said writ in the uninterrupted, quiet, peaceable, and actual seizen and possession of said premises in said declaration set forth and described, for and during the time claiming the same as their proper, sole, and rightful estate in fee-simple in manner and form as said defendants have above in their second plea alleged, and this the plaintiff prays may be enquired of by the county, etc.

By his attorneys, JAMES C. COLLINS,
LIVINGSTON SCOTT,
ELISHA C. MOWRY.

And the defendants do likewise.

By their attorney, WM. H. GREENE.

The death of one of the defendants, Ferdinand S. Eddy, is suggested, July 13, 1880, by the defendants' counsel.

WM. H. GREENE.

13 *Agreement as to Plea of 20 Years' Possession. Filed Dec. 5th*, 1882.

In the above case it is agreed that the plea of the Statute of Possessions now on file therein shall be held to apply to any period or periods of twenty years that could be covered by any other like plea or pleas that might be or might have been filed therein, and that either party may offer any evidence and rely upon any matters that would be admissible under any such other plea or pleas, and any proper replications and other pleadings thereon.

LIVINGSTON SCOTT,
Pl'ff's Attorney.
WM. H. GREENE,
Att'y for Defendant-.

14 This cause was continued from said November term, 1874, from term to term, to the June term, 1880, of said court, when, issue being joined as aforesaid, it was committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, returned their verdict therein upon oath and say that—

"The jury find that the defendants are not guilty of the trespasses or any part thereof in manner and form as the plaintiffs have alleged in their declaration."

(Signed) F. A. STEERE, *Foreman.*

The plaintiffs thereupon filed a motion for a new trial, which being considered by the court, it was ordered, on the 2d day of March, 1881, that the verdict be set aside and a new trial granted.

And said cause being further continued to the November term, 1881, of said court it was again called for trial before a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein upon oath and say that —

The jury empannelled in the above cause find that the defendants are guilty in manner and form as alleged in the third count of the declaration herein, and also that neither said defendants nor any person or persons from whom they derive their

15 title have been for the space of twenty years in the uninterrupted, quiet, peaceable, and actual seizen and possession of the premises described in the third count of the declaration, for and during the said time claiming the same as his, her, or their sole and rightful estate in fee-simple, as in the said plea of said defendants is alleged.

(Signed) ALLEN GREENE, *Foreman.*

The defendants thereupon filed a motion for a new trial, which being considered by the court is granted.

And said cause being further continued to the present November term, 1882, it is again called for trial and committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein upon oath and say that—

The jury find that the defendants are guilty in manner and form, as alleged in the fifth count of the declaration herein, and also that neither said defendants nor any person or persons from whom they derive their title have been for the space of *any* twenty years in the uninterrupted, quiet, peaceable, and actual seizen and possession of the premises described in the fifth count of the declaration herein, for and during the said time claiming the same as his, her, or their sole and rightful estate in fee-simple, as in said plea of said defendants is alleged.

(Signed) NAT. GLADDING, *Foreman.*

16 **Exceptions were taken to the charge and instructions of the court to the jury before the verdict was rendered.**

And on the one hundred and fourth day of said November term, 1882, to wit, June 14th, 1883, the following judgment was entered:

Judgment.

It is considered by the court here that the plaintiff recover and have of the defendants possession of twenty-seven twenty-eighth-parts of the premises described in the fifth count of the plaintiff's declaration, together with the costs of said action, taxed at six hundred and twenty-six dollars and seventy-three cents.

Petition for Writ of Error. Filed June 14, 1882.

Respectfully represent the said Lucy W. Fletcher and Amy Eddy the defendants in said action:

That at the November term, 1882, of the said court held in and for said district the above-entitled action came on to be heard before the court and a jury, and in which cause the jury at said term rendered a verdict for the plaintiff upon the fifth count of his declaration.

And your petitioners represent that in their opinion errors in matter of law were committed by the court in its rulings in the course of the trial of and in its instructions to the jury in
17 said cause, which are specially assigned in the bill of exceptions herewith rendered.

Wherefore they pray that said bill of exceptions and a writ of error may be allowed and that said cause may be removed to the Supreme Court of the United States for the correction of the errors assigned.

LUCY W. FLETCHER,
AMY EDDY.
By their attorneys, JAMES TELLINGHAST,
WM. H. GREENE.

JUNE 14th, 1883.

Allowed and let a writ of error issue.

LE BARON B. COLT,
Judge of the District Court of the United States for the District of Rhode Island.

Bond on Appeal.

Know all men by these presents that we, Lucy W. Fletcher and Amy Eddy, of Providence, in the State of Rhode Island, as principals, and Nathaniel D. Fletcher, of said Providence, as surety, are holden and firmly bound unto Nathan Fuller, of Haddam, in the State of Connecticut, in his own right and as trustee, in the full sum of fifteen hundred dollars; to which payment, well and truly to be made, we bind ourselves, our several and respective heirs, executors, and administrators, jointly and severally, by these presents.
18 Sealed with our seals and dated this fourteenth day of June, in the year eighteen hundred and eighty-three.

Whereas lately at a circuit court of the United States holden at

Providence, within and for the district of Rhode Island, on said fourteenth day of June, eighteen hundred and eighty-three, in a suit depending in said court between the said Nathan Fuller, plaintiff in the aforesaid capacity, and the said Lucy W. Fletcher and Amy Eddy, defendants, judgment was rendered against these defendants for the possession of twenty-seven twenty-eighths parts of the premises described in the fifth count of the plaintiff's declaration, together with the taxed costs of said suit.

And the said Lucy W. Fletcher and Amy Eddy having obtained leave to remove said cause to the Supreme Court of the United States upon a writ of error, and having filed a copy of said writ in the clerk's office of said Court to reverse the judgment on the aforesaid suit, and a citation directed to the said Nathan Fuller citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Tuesday of October next ensuing:

Now the condition of the above obligation is such that if the said Lucy W. Fletcher and Amy Eddy shall prosecute the said writ of error with effect and answer all damages and costs, including just damages for the delay, if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LUCY W. FLETCHER. [SEAL.]
AMY EDDY. [SEAL.]
NATHANIEL D. FLETCHER. [SEAL.]

Sealed and delivered in presence of—
CHARLES F. EDDY,
Witness to Amy Eddy.
BELLE F. LILLEY,
Witness to Lucy W. Fletcher.
WM. W. EDDY,
Witness to N. D. Fletcher.

Approved.

LE BARON B. COLT,
U. S. Judge.

19 *Bill of Exceptions.*

Circuit Court of the United States for the District of Rhode Island, *sc.* November Term, 1882.

NATHAN FULLER, for Self & as Trustee,
vs.
LUCY W. FLETCHER & AMY EDDY. } No. 838.

This cause came on for trial in said court at the above term thereof, at Providence, in said district, before Hon. Le Baron B. Colt, district judge, with a jury duly impanelled and sworn to try the issues in the same between the plaintiff and said defendants, Ferdinand S. Eddy, the other defendant named in the pleadings, having deceased prior to said trial, as duly suggested upon the record in the case.

The action was trespass and ejectment to recover possession of $\frac{2}{2}\frac{7}{8}$ undivided parts of a lot of land containing about fourteen acres of land situated in the town of Lincoln (formerly Smithfield), in said district. The declaration contained several counts in the usual form, but all were withdrawn except the last two, the fifth and sixth, upon which alone the case went to the jury. The defendants pleaded the general issue and twenty years' possession under the statute, upon which issues were joined, and the case was tried upon these issues and upon the written stipulation between the parties
20 respecting this second plea and the evidence admissible under the same, a copy of which appears in the record.

It was in evidence that the land in question was of the value of upwards of $19,000 (nineteen thousand dollars), & was the westerly portion of what was formerly a tract said to contain about 33⅓ acres, which was bounded easterly on Blackstone or Pawtucket river, and through which the Valley Falls turnpike, or Broad street, so called, running northerly and southerly, was opened about the year 1816. This tract of 33⅓ acres was formerly owned by one James Reed, and by the early conveyances became divided into three parcels, as shown by the diagram showing the relative location of the lands submitted to the jury by the consent of the parties, of which the following is a reduced copy.

(Here follows diagram marked p. 20.)

21 The 22¼-acre parcel was conveyed to Francis Richardson, of Attleborough, Massachusetts by deed, dated April 10th, 1750, and the land in question is the westerly portion of this parcel lying west of the turnpike, as afterwards opened through the same, as above stated. The 5½-acre parcel was conveyed to Ezekiel Fuller by deed dated November 17th, 1750; the 6-acre parcel was conveyed to Abigail Fuller, wife of said Ezekiel and daughter of said Francis Richardson, by deed dated January 21st, 1756.

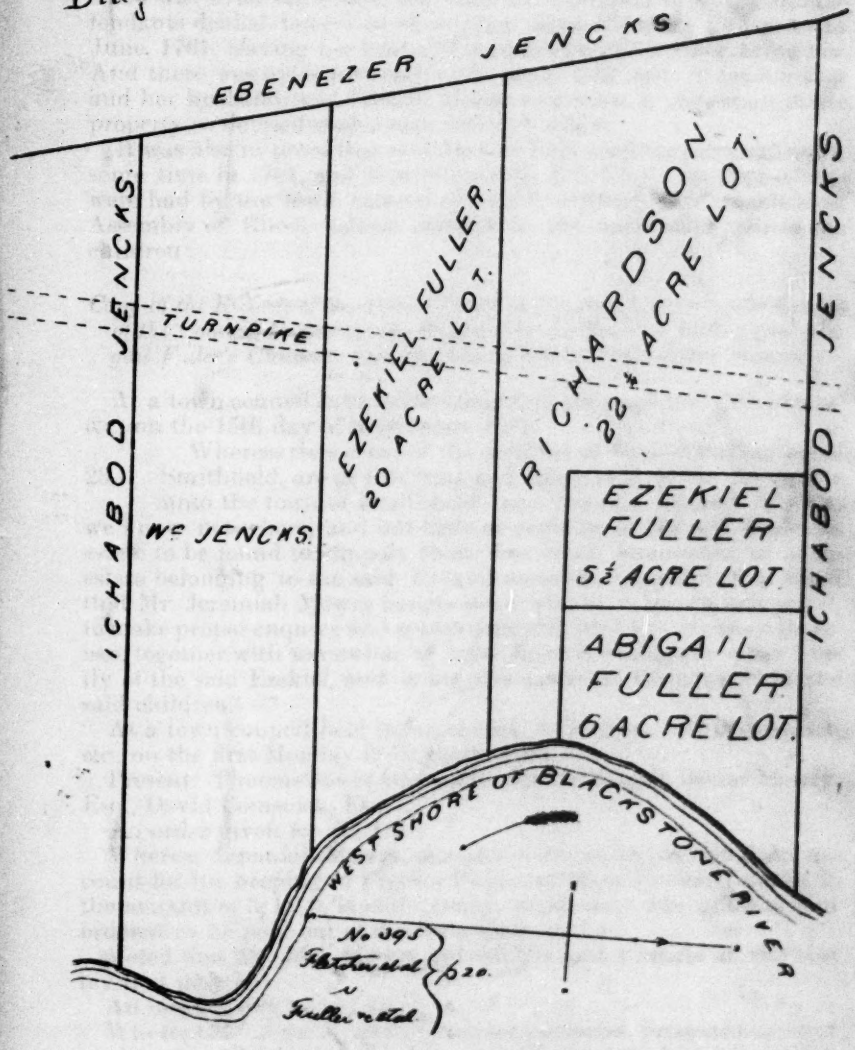
The plaintiff claimed to derive his title under the will of said Francis Richardson, dated May 26th, 1749, and the codicil thereto, dated August 10th, 1750, admitted to probate in Massachusetts January 19, 1756.

And the plaintiff offered in evidence to prove his title a copy of said will and codicil and Massachusetts probate, with the record of the due filing and recording of the same upon the 27th day of August, 1881, in the probate office in the town of Lincoln (formerly Smithfield), in the State of Rhode Island, where said land is situate, all duly certified by the clerk of the probate court of said town upon said papers offered in evidence as aforesaid, and showed and offered proof of no other title.

The defendants objected to the admission of these in evidence, the same not having been filed nor admitted to probate in Rhode Island until after the commencement of this suit; but the court admitted them in evidence; to which the defendants then and there duly excepted.

22 By the codicil to this will the said 22¼-acre parcel was devised to the daughter of said testator, Abigail Fuller, wife of

Diagram


EBENEZER JENCKS
ICHABOD JENCKS.
TURNPIKE
EZEKIEL FULLER 20 ACRE LOT.
RICHARDSON 22 ACRE LOT
ICHABOD JENCKS
Wm JENCKS.
EZEKIEL FULLER 5½ ACRE LOT
ABIGAIL FULLER 6 ACRE LOT.
WEST SHORE OF BLACKSTONE RIVER
No 395
Fletcher rd
&
Fuller rd
620.

said Ezekiel Fuller, from whom the plaintiff proved descent of himself and those from whom he claimed to derive his title. It was also in proof that this Abigail Fuller died prior to the year 1766, and there was evidence which the plaintiff claimed, but which the defendants denied, tended to show that Abigail Fuller died prior to June, 1761, leaving her husband, said Ezekiel Fuller, surviving her. And there was evidence tending to show that said Abigail Fuller and her husband, said Ezekiel Fuller, entered into possession of the property so devised under said will and codicil.

It was also in proof that said Ezekiel Fuller left for parts unknown some time in 1761, and that thereupon the following proceedings were had by the town council of said Smithfield and the General Assembly of Rhode Island relative to the support of two of his children:

Copy of the Records of the Town Council of Smithfield, Reciting the Doings of the Council Respecting the Support, by the Town, of Ezekiel and Abigail Fuller's Children, and Respecting Estate in the Fuller Family.

At a town council held in Smithfield, in the county of Providence' &c., on the 15th day of September, 1761.

Whereas *there is* two of the children of Ezekiel Fuller, late of
23 Smithfield, are at this time and likely still to be chargeable unto the town of Smithfield; and the said Ezekiel is gone, we know not where, and but little or nothing of the said Ezekiel's estate to be found to support them but there a-sumption of some estate belonging to the said Ezekiel *sureated*; therefore it is voted that Mr. Jeremiah Mowry be appointed, and he is hereby appointed, to make proper enquiry and search unto and after the aforesaid premises, together with somewhat of land there is belonging to the family of the said Ezekiel, and secure the same for the support of the said children.

At a town council held in Smithfield, in the county of Providence, &c., on the first Monday in January, 1762.

Present: Thomas Steere, president; Ezekiel Angell, Daniel Mowry, Esq., David Comstock, Esq.

An order given for £3, 18, 0.

Whereas Jeremiah Mowry, one of the overseers, presented an account for the keeping of Francis Fuller by Mary Fuller 31 weeks, to the amount of 3, 18, 0, lawful money, which acc't was allowed and ordered to be paid out of the town treasury:

Voted that Mr. Jere. Mowry put out the said Francis at the best lay that may be.

An order given for £3, 13, 0.

Whereas Mr. Jere. Mowry, one of the overseers, presented an acc't against the town of Smithfield, by him charged for keeping Abigail Fuller from ye 30th day of June, 1761, until the 4th day of Jan'y, 1762, by John Williams, to the amount of 3, 13, 0, lawful money, which sum is allowed and ordered to be paid out of the town treasury.

24 At a town coun*sel* held in Smithfield, in the county of Providence, &c., according to adjournment, on the first Monday of March, A. D. 1762.

Whereas one Ezekiel Fuller, late of Smithfield, in the county of Providence, &c., who went abroad the last summer, where to is uncertain, *he* left two or three small children, which are, and still likely to be, chargeable unto the town of Smithfield aforesaid, and nothing of the said Fuller's estate to maintain the same left behind but a small piece of land; therefore, — can have no relief for the supportment of said children without the favor and grant of the General Assembly to be enabled to sell and give a deed of the aforesaid piece of land. Whereupon it is voted by this council that Daniel Mowry, Jr., [be] and he is hereby, chosen and appointed to lay the premises before the Generai Assembly of this colony, and request that they would pass an act to enable some proper person to dispose of the aforesaid piece of land, clothing him with authority to give *and* deed therefore.

At a town council held in Smithfield, in the county of Providence, &c., by warrant from under the hand & seal of Thomas Steere, Esq., president, on the 11th day of July, A. D. 1763.

Whereas Jeremiah Mowry, one of the overseers of the poor, informed this council one Francis Fuller, son of Ezekiel Fuller, of Smithfield, &c., which is at this time and has been some time heretofore chargeable to said overseer, has agreed with one Samuel Fuller, of Attleborough, that he keep the said Francis for two
25 shillings, lawful money, per week, which sum is allowed and ordered to be paid out of the town treasury, and likewise consented that said Mowry agree at the same rate awhile longer until further orders.

And that Abigail Fuller, daughter of the said Ezekiel, be provided for in the like manner, with some proper person that doth present.

At a town council, held in Smithfield, in the county of Providence, &c., according to adjournment, on the 15th day of August, A. D. 1763—

Voted, that Mary Fuller be allowed and paid out of the town treasury the sum of two shillings, lawful money, per week from the 1st Monday of January, 1762, until this date, it being for keeping of Francis Fuller, and that there be no more money allowed for maint*ai*nance of said Francis without a further agreement made by one or both of the overseers of the poor.

At a town council held at Smithfield, in the county of Providence, the 9th day of April, A. D. 1764, meet according to their last adjournment.

Whereas Thomas Steere, Ezekiel Angell, William Jencks, and Daniel Mowry, members of the town council, hired eight dollars of Preserved Harris to pay unto Mary Fuller for keeping of Francis Fuller, for which sum we, the aforesaid members, promise to pay ten per cent. interest until paid unto the aforesaid Preserved.

It is agreed between Mary Fuller, of Attleborough, and the town council, that the said Mary take by indenture Francis Fuller, a poor

child of Ezekiel Fuller, which is chargeable to the town of
26 Smithfield, and for her reward therefor she is to have fifty-seven dollars for the maintenance thereof, together with what is already due from said town to said Mary.

Dated April 9th, 1764.

her
MARY x FULLER.
mark.

DAN'L MOWRY, Jun'r, *C. Clk.*

Received April 9th, 1764, of the town council of Smithfield, eight Spanish mill dollars, in part for keeping Francis Fuller.

her
Witness: MARY x FULLER.
mark.

At a town council held in Smithfield, in the county of Providence, &c., by adjournment, on the 15th day of September, A. D. 1767, and 7th year of his Majesty's reign—

Voted, that Mr. Stephen Whipple proceed, sell, and dispose of all the land belonging unto Ezekiel Fuller, late of Smithfield, all the said land situate in said Smithfield; that the fee appears to be in said Fuller, and when he, the said Whipple, hath negotiated said business, to transmit a state of the case before this council, agreeable to an act of General Assembly passed at South Kingston in February, 1766.

Petition to the General Assembly, Feb., 1766, by Daniel Mowry, Jr., Asking that Some Person may be Appointed to Sell and Deed the Land of Ezekiel and Abigail Fuller for the Support of their Children.
27 *Resolution of Assembly.*

To the honourable General Assembly now sitting at South Kingston in and for the colony of Rhode Island, on the last Monday of February, A. D. 1766, Daniel Mowry, Jun., of Smithfield, in the county of Providence, humbly shows:

That one Ezekiel Fuller, late of said Smithfield, hath absconded and left this colony, and hath left two small children, which are and have been chargeable to the said town.

And whereas the said Ezekiel hath left no visible estate except some land lying in said Smithfield, whereof the said Ezekiel was possessed in right of his late deceased wife, by whom he had the aforesaid children, *and* thereupon the town council of said town have empowered and ordered the said Daniel to lay this matter before the Assembly, praying aid that said estate may be sold and disposed of to the best advantage to and for the support and maintainance of said children.

Wherefore the said Daniel humbly prays that by an act of this Assembly some person may be appointed to sell and dispose of the whole of said estate for the purposes aforesaid, and that a deed or deeds by such person given shall make and vest in the purchaser or purchasers all such rights and interests in and unto the premises as the said Ezekiel and wife could or might lawfully convey.

DANIEL MOWRY, Jr.

(Endorsed.)

FEBRUARY 26TH, 1766.

To the House of Majesties.

GENT.:

28 Resolved, That the within petition be granted, and that the town treasurer of said Smithfield (by and with the consent and advice of the town council of said town) be, and he is hereby, empowered to sell and dispose of the said land, and that the money arising therefrom be applied for the purposes set forth in said petition.

Voted and past.

P. order: J. LYNDON, *Cler.*

In the upper house.

Read the same day and concurred in with this amendment—that the money arising from the sale of said land be lodged in the town treasury for said purposes.

G 1. Daniel Mowry's petition.

By order: HENRY WARD, *Sec'ry.*

Read the same day in the lower houses and concurred [in].

P. order: J. LYNDON, *Cler.*

And that thereupon the town treasurer made the following deed of the 6-acre parcel of land aforesaid:

Deed. Stephen Whipple, Town Treasurer, to David Kennedy, March 30th, 1768.

Consideration, £30. Recorded April 19th, 1768.

Stephen Whipple, &c., town treasurer of Smithfield, &c. * * *

I, the said Stephen Whipple, in my said capacity, by, from, and under the power and authority to me given and granted by the honorable the General Assembly of the Governor and company of said colony, begun and holden by adjournment at South Kingston, within and for said colony, on the last Monday in

29 February, in the year of our Lord one thousand seven hundred and sixty-six, and sixth year of his Majesty's reign (and by and with the consent and advice of the town council of Smithfield aforesaid), for and in consideration of, &c., * * * paid by David Kennedy, of North Providence, &c., convey and confirm unto him, the said Kennedy, his heirs and assigns, forever, a certain tract of land in Smithfield, and late possessed and improved by one Ezekiel Fuller, of said Smithfield, husbandman, in the right of his late wife, Abigail Fuller, deceased, containing six acres, and is bounded as follows: Beginning at the northeast corner at a stake and stones at the westerly bank at side of Pawtucket river (so called), and is a corner of land belonging to Ichabod Jenks; thence extending southerly by the bank of said river thirty-five rods to another stake and stones for a corner; thence extending westerly, bounded

southerly with land now claimed by Francis Richardson, about 39 rods to a stake and stones for a corner; thence extending northerly on a straight line about 35 rods to stake and stones for a corner, standing in the line of land belonging to the said Ichabod Jenks; from thence extending easterly on a straight line with land belonging to the said Ichabod Jenks to the first-mentioned corner. However, it is the true intent and meaning of the grantor and grantee in these presents that the northerly and southerly lines from said river shall extend westerly of equal length so many rods as shall make said tract of land herein and hereby conveyed the exact complement of six acres, covenants of warranty, &c., inserted.

30 It was also in proof that said Abigail left four sons and a daughter surviving, namely: Ezekiel Fuller, born January 1st, 1751; Isaiah Fuller, born March 19th, 1753; George Fuller, born September 27, 1755; Abigail Fuller, born December 29th, 1757, and Francis Fuller, the date of whose birth was unknown, and who, with his sister Abigail, was mentioned in the town council records of said Smithfield in 1762 as small children supported by the town.

All these children, excepting the daughter, Abigail, Jr., died intestate and without issue some time prior to the death of their father, who died at the poor-house in said Attleborough in or about July, 1800. Said Abigail, Jr., who was the grandmother of the plaintiff, attained the age of twenty-one years December 29th, 1778, and married Benjamin Fuller December 1st, 1779. Said Benjamin Fuller died in 1832, and said Abigail, Jr., survived him and died in 1835 intestate.

To prove his title the plaintiff offered in evidence the power of attorney and the deed from all the other heirs (except one) of said Abigail, Jr., to himself, he being also one of said heirs, bearing date the 24th day of May, 1874, of which the following are copies:

Know all men by these presents that we, Truman B. Fuller, of Rehoboth, in the county of Bristol and Commonwealth of Massachusetts, and Ruth S. Fuller, wife of said Truman B.; Joseph R. Fuller, of Lincoln, in the county of Providence and State of Rhode Island, and Harriet Fuller, wife of said Joseph R.; Leprelet

31 P. Fisher, of Attleborough, in said county of Bristol and Commonwealth of Massachusetts, and Abigail J. Fisher, wife of said Leprelet P., in right of said Abigail J.; Eliza A. Clark, of said Attleborough; George W. Fuller, of said Lincoln; Marcus M. Fuller, of Cumberland, in said county of Providence and State of Rhode Island, and Ann Eliza Fuller, wife of said Marcus M.; Charles A. Adams, of said Cumberland, and Philena Adams, wife of said Charles A., in right of said Philena; William A. Sylverter, of said Attleborough, and Clarissa Sylvester, wife of William A., in right of said Clarissa; Benjamin Fuller, of said Lincoln, and Susan L. Fuller, wife of said Benjamin; Elijah B. Fuller, of said Cumberland, and Sally Ann Fuller, wife of said Elijah B.; Nathan Fuller, of Haddam, in the county of Middlesex and State of Connecticut, and Jane R. Fuller, wife of said Nathan; Samuel E. French, of Pawtucket, in

said county of Providence, and Harriet French, wife of said Samuel E., in right of said Harriet; Simon C. Watts, of North Waterford, in the county of Oxford and State of Maine, and Medora Watts, wife of said Simon C., in right of said Medora; Sydney A. Fuller, of said Pawtucket, and Mary Elizabeth Fuller, wife of said Sydney A. Fuller; Walter B. Fuller, of said Lincoln; John W. Carter, of said Lincoln, and Ella J. Carter, wife of said John W., in right of said Ella J.; William J. Smith, of Duxbury, in the county of ———, in said Commonwealth of Massachusetts, and Mary A. Smith, wife of said William J. Smith, in right of said Mary A.; Charles Thomas, of the
32 city of Providence, in said county of Providence and State of Rhode Island, and Lydia V. Thomas, wife of said Charles, in right of said Lydia V., and Eugene Fuller, of said Providence, do hereby make, constitute, and appoint Theodore C. Fuller, of said Pawtucket, our true, sufficient, and lawful attorney for us and each of us, and in our and each of our names, to grant, bargain, and to sell all our right, title, and interest in and to all that certain tract of land lying and situate in the said town of Lincoln—known as the Fuller land—which was conveyed to Francis Richardson by deed from James Reed, bearing date April (10th) tenth, A. D. one thousand seven hundred and fifty (1750), and recorded in the records of land evidence of the old town of Smithfield, in said county of Providence and State of Rhode Island, in book No. (3) three, pp. 31 and 32, reference to which deed is here had for a more particular description of the premises; said tract of land being the same that was devised to Abigail Fuller, wife of Ezekiel Fuller, by said Francis Richardson in and by his "last will and testament" duly proved January 19th, 1756, in the probate court of Bristol county, Massachusetts, to said Nathan Fuller.

To have and to hold the same unto the said Nathan Fuller, his successors and assigns, in fee upon the trusts nevertheless, and to and for the uses and interests and purposes hereinafter named, limited, and described—that is to say, upon trust to take and prosecute to final conclusion all legal proceedings which he may be advised are necessary to recover possession of the above-described premises, for our benefit and the benefit of each of us, and to employ Thomas
A. Jencks, of said Cumberland; Livingston Scott, of the city
33 and county and State of New York, and James C. Collins, of North Providence, in said county of Providence and State of Rhode Island, and Elisha C. Mowry, of said Providence, as his attorneys and counsellers, to conduct said proceedings, and upon such terms as he and they shall agree, and to make such compromises of said actions and proceedings and of our and each of our claims to said land as he and his said counsel deem for the best interests of us and each of us, and to make all sales and conveyances of said land necessary for the payment of the fees of said counsel and the expenses and disbursements incurred in prosecuting our claims to said land; and we authorize said Theodore C., for us and each of us, and in our and each of our names, to make, execute, acknowledge, and deliver a good and sufficient deed and conveyance for the same and upon the trusts hereinbefore declared.

In witness whereof we have hereunto set our hands and seals this 24th day of May, one thousand eight hundred and seventy-four.

Signed, sealed, and delivered in presence of Elisha C. Mowry, except as to signature of W. J. Smith.

	TRUMAN B. FULLER.	[L. S.]
	RUTH S. FULLER.	[L. S.]
	SAMUEL E. FRENCH.	[L. S.]
	HARRIET FRENCH.	[L. S.]
	JOS. R. FULLER.	[L. S.]
	GEORGE W. FULLER.	[L. S.]
	SIDNEY A. FULLER.	[L. S.]
	MARY ELIZABETH FULLER.	[L. S.]
	WALTER B. FULLER.	[L. S.]
	ELLA J. CARTER.	[L. S.]
	LEPRELET P. FISHER.	[L. S.]
	ABIGAIL J. FISHER.	[L. S.]
	HARRIET B. x FULLER. (her mark.)	[L. S.]
	PHILENA ADAMS.	[L. S.]
	WM. A. SYLVESTER.	[L. S.]
	CLARISSA SYLVESTER.	[L. S.]
	BENJ'M FULLER.	[L. S.]
	SUSAN L. FULLER.	[L. S.]
	ELIJAH B. FULLER.	[L. S.]
	JOHN W. CARTER.	[L. S.]
	S. C. WATTS.	[L. S.]
	MEDORA WATTS.	[L. S.]
	W. J. SMITH.	[L. S.]
	MARY A. SMITH.	[L. S.]
34	ELIZA A. CLARK.	[L. S.]
	MARCUS M. FULLER.	[L. S.]
	ANN E. FULLER.	[L. S.]
	CHARLES A. ADAMS.	[L. S.]
	LYDIA VICTORIA THOMAS.	[L. S.]
	CHARLES S. THOMAS.	[L. S.]
	EUGENE FULLER.	[L. S.]
	SALLY ANN FULLER.	[L. S.]

STATE OF MAINE, *Oxford Co.*, } *ss:*

In Stoneham, this 21st day of May, A. D. 1874, personally came before me Simon C. Watts, signer of the aforegoing instrument as S. C. Watts, and acknowledged the same by him signed to be his free and voluntary act and deed.

SUMNER EVANS,
Justice of the Peace.

STATE OF MASSACHUSETTS, *Plymouth*, } *ss*:

DUXBURY, *May* 23*d*, 1874.

Then personally came before me W. J. Smith and Mary A. Smith and acknowledged *that* their signatures to the foregoing instrument to be their free act and deed.

HARVEY SOULE,
Justice of the Peace.

STATE OF RHODE ISLAND, *Providence Co.*, } *sc*:

In Pawtucket, this 24th day of May, A. D. 1874, personally came before me Truman B. Fuller, Samuel E. French, Joseph R. Fuller, George W. Fuller, Sidney A. Fuller, Walter B. Fuller, Leprelet P. Fisher, Eliza A. Clark, Marcus M. Fuller, Charles A. Adams, William A. Sylvester, Benjamin Fuller, Elijah B. Fuller, John W. Carter, Charles S. Thomas, and Eugene Fuller, and severally acknowledged the aforegoing instrument by them signed to be
35 their free and voluntary act and deed, and also, at the same time and place, personally came before me Harriet French, wife of said Samuel E. French; Ella J. Carter, wife of said John W. Carter; Abigail J. Fisher, wife of said Leprelet P. Fisher; Philina Adams, wife of said Charles A. Adams; Clarissa Sylvester, wife of said William A. Sylvester; Medora Watts, wife of said Simon C. Watts; Mary A. Smith, wife of said William J. Smith, and Lydia Victoria Thomas, wife of said Charles S. Thomas, and, after being by me severally examined privily and apart from their said husbands, and having the aforegoing deed shown and explained to them by me, severally acknowledged the same, being so apart from their said husbands, to be their free and voluntary acts and deed, and that they did not wish to retract the same.

ELISHA C. MOWRY,
Public Notary.

Received for record Oct. 21st, 1874, at 9 o'clock a. m.

Know all men by these presents that we, Truman B. Fuller, of Rehoboth, in the county of Bristol and Commonwealth of Massachusetts, and Ruth S. Fuller, wife of said Truman B.; Joseph R. Fuller, of Lincoln, in the county of Providence and State of Rhode Island, and Harriet B. Fuller, wife of said Joseph R.; Leprelet P. Fisher, of Attleborough, in said county of Bristol and Commonwealth of Massachusetts, and Abigail J. Fisher, wife of said Leprelet P., in right of said Abigail J.; Eliza A. Clark, of said Attleborough; George W. Fuller, of said Lincoln; Marcus M. Fuller, of Cumberland, in said county of Providence and State of Rhode Island, and Ann Eliza Fuller, wife of said Marcus M.; Charles A. Adams, of said Cumberland, and Philena Adams, wife of said Charles A., in right of
36 said Philena; William A. Sylvester, of said Attleborough, and Clarissa Sylvester, wife of said William A., in right of said Clarissa; Benjamin Fuller, of said Lincoln, and Susan L. Fuller, wife of said Benjamin; Elijah B. Fuller, of said Cumberland, and

Sally Ann Fuller, wife of said Elijah B.; Samuel E. French, of Pawtucket, in said county of Providence and State of Rhode Island, and Harriet French, wife of said Samuel E., in right [of] said Harriet; Simon C. Watts, of North Waterford, in the county of Oxford and State of Maine, and Medora Watts, wife of said Simon C., in right of said Medora; Sidney A. Fuller, of said Pawtucket, and Mary Elizabeth Fuller, wife of said Sidney A.; Walter B. Fuller, of said Lincoln; John W. Carter, of said Lincoln, and Ella J. Carter, wife of said John W. Carter, in right of said Ella J.; William J. Smith, of Duxbury, in the county of Plymouth, in said Commonwealth of Massachusetts, and Mary A. Smith, wife of said William J., in right of said Mary A.; Charles S. Thomas, of the city of Providence and State of Rhode Island, and Lydia V. Thomas, wife of said Charles S., in right of said Lydia V., and Eugene Fuller, of said Providence, for and in consideration of *of* the sum of ten dollars to us paid by Nathan Fuller, of Haddam, in the county of Middlesex and State of Connecticut, the receipt whereof we do hereby acknowledge, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said Nathan Fuller and to his successors and assigns forever all our right, title, and interest in and to—

A certain tract of land situate in said town of Lincoln,
37 known as the Fuller land, which was conveyed to Francis Richardson by deed from James Reed, bearing date April (10th) tenth, A. D. one thousand seven hundred and fifty (1750), and recorded in the records of land evidence of the old town of Smithfield, in said county of Providence and State of Rhode Island, in Book No. 3, pp. 31 and 32, reference to which deed is here had for a more particular description of the premises; said tract of land being the same that was devised to Abigail Fuller, wife of Ezekiel Fuller, by said Francis Richardson, in and by his last will and testament, duly proved in the probate court of Bristol county, in said Commonwealth of Massachusetts, on the 19th day of January, A. D. one thousand seven hundred and fifty-six, reference to which land records and to the records of said court is here had for a more particular description of the premises hereby conveyed.

To have and to hold the same, with all the rights and privileges thereunto belonging to him, the said Nathan Fuller, his successors and assigns forever, in fee upon the special trusts nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described, and declared—that is to say, upon trust to take all legal proceedings that he may be advised are necessary and proper for recovering possession of the above-described premises for the benefit of the grantors hereinafter named, and to that end to employ Thomas A. Jencks, of Cumberland aforesaid; Livingston Scott, of the city, county, and State of New York; James C. Collins, of North Providence, in said county of Providence and State of Rhode Island, and Elisha C. Mowry, as his attorneys and counsellors to conduct said proceedings, and upon such terms as he and they shall agree, and
38 to make such compromises of all legal proceedings and of the

claims of said parties named as grantors herein to the above-described premises as he and said counsel shall deem to be for the best interests of the said grantors, and to make all sales and conveyances of said premises necessary for the payment of the fees of such counsel and the expenses and disbursements incurred in the prosecution of said claims.

In witness whereof I, Theodore C. Fuller, in pursuance of a letter of attorney hereunto annexed, bearing date the 24th day of May, A. D. one thousand eight hundred and seventy-four, have set the hands and seals of the parties hereinbefore named as grantors.

Signed, sealed, and delivered in presence of—

TRUMAN B. FULLER [L. S.], by his att'y, Theodore C. Fuller.
RUTH S. FULLER [L. S.], by her att'y, Theodore C. Fuller.
GEORGE W. FULLER [L. S.], by his att'y, Theodore C. Fuller.
ELIZA A. CLARK [L. S.], by her att'y, Theodore C. Fuller.
ABIGAIL J. FISHER [L. S.], by her att'y, Theodore C. Fuller.
MARCUS M. FULLER [L. S.], by his att'y, Theodore C. Fuller.
ANN ELIZA FULLER [L. S.], by her att'y, Theodore C. Fuller.
CHARLES A. ADAMS [L. S.], by his att'y, Theodore C. Fuller.
PHILENA ADAMS [L. S.], by her att'y, Theodore C. Fuller.
WILLIAM A. SYLVESTER [L. S.], by his att'y, Theodore C. Fuller.
CLARISSA SYLVESTER [L. S.], by her att'y, Theodore C. Fuller.
BENJAMIN FULLER [L. S.], by his att'y, Theodore C. Fuller.
SUSAN L. FULLER [L. S.], by her att'y, Theodore C. Fuller.
ELIJAH B. FULLER [L. S.], by his att'y, Theodore C. Fuller.
JOSEPH R. FULLER [L. S.], by his att'y, Theodore C. Fuller.
HARRIET B. FULLER [L. S.], by her att'y, Theodore C. Fuller.
LEPRELET P. FISHER [L. S.], by his att'y, Theodore C. Fuller.
SIMON C. WATTS [L. S.], by his att'y, Theodore C. Fuller.
MEDORA WATTS [L. S.], by her att'y, Theodore C. Fuller.
39 SIDNEY A. FULLER [L. S.], by his att'y, Theodore C. Fuller.
MARY ELIZABETH FULLER [L. S.], by her att'y, Theodore C. Fuller.
WALTER B. FULLER [L. S.], by his att'y, Theodore C. Fuller.
JOHN W. CARTER [L. S.], by his att'y, Theodore C. Fuller.
ELLA J. CARTER [L. S.], by her att'y, Theodore C. Fuller.
WILLIAM J. SMITH [L. S.], by his att'y, Theodore C. Fuller.
MARY A. SMITH [L. S.], by her att'y, Theodore C. Fuller.
SALLY ANN FULLER [L. S.], by her att'y, Theodore C. Fuller.
SAMUEL E. FRENCH [L. S.], by his att'y, Theodore C. Fuller.
HARRIET FRENCH [L. S.], by her att'y, Theodore C. Fuller.
CHARLES S. THOMAS [L. S.], by his att'y, Theodore C. Fuller.
LYDIA V. THOMAS [L. S.], by her att'y, Thodore C. Fuller.
EUGENE FULLER [L. S.], by his att'y, Theodore C. Fuller.

STATE OF RHODE ISLAND, } *ss:*
Providence Co., }

In Pawtucket, this 5th day of June, A. D. 1874, came before me Truman B. Fuller, Ruth S. Fuller, Joseph R. Fuller, Harriet B. Fuller, Leprelet P. Fisher, Abigail J. Fisher, Eliza A. Clarke, George

W. Fuller, Marcus M. Fuller, Ann Eliza Fuller, Charles A. Adams, Philena Adams, William A. Sylvester, Clarissa Sylvester, Benjamin Fuller, Susan L. Fuller, Elijah B. Fuller, Sally Ann Fuller, Samuel E. French, Harriet French, Simon C. Watts, Medora Watts, Sidney A. Fuller, Mary Elizabeth Fuller, Walter B. Fuller, John W. Carter, Ella J. Carter, William J. Smith, Mary A. Smith, Charles S. Thomas, Lydia V. Thomas, and Eugene Fuller, by their attorney, Theodore C. Fuller, and by their said attorney acknowledged the aforegoing instrument, by them signed, by their said attorney, to be their free and voluntary act and deed.

40 ELISHA C. MOWRY,
Notary Public.

Recorded Oct. 21st, 1874, at 9¼ o'clock a. m.

41 The testimony as to the delivery of this deed was as follows:

THEODORE C. FULLER testified:

Q. I will ask you what you did under that power that you got—in execution of this power?
A. I took possession.
Q. How?
A. Made entry; went up there on the land.
Q. Made entry upon this lot, did you?
A. Yes, sir.
Q. Upon this lot?
A. Yes, sir.
Q. While upon that lot making entry what did you do?
A. I gave Nathan Fuller possession of that property by deed.
Q. You passed that deed over to him of the property, did you?
A. Yes, sir.

Cross-examination by Mr. GREENE:

Q. You say you went on the land?
A. Yes, sir.
Q. Who was present?
A. Nathan Fuller was present.
Q. Who else?
A. That is my father.
Q. Who else?
A. Mr. Mowry, Daniel G. ——, and Mr. Collins there, who sits side of you.
Q. Mr. Scott?
A. No, sir.
Q. What did you do on the land?
A. I passed the deed to my father and took possession of the land; made entry.
Q. Did you do anything more than to step on the land and
42 to pass the deed to him?
A. I think I took up some dirt in my hand also and passed to him.

Q. You took up some dirt in your hand?
A. Yes, sir.
Q. Who told you to do that?
A. I was instructed by the counsel to do it, sir.
Q. For what purpose? Was it or not because somebody else was in adverse possession of the property?
A. I guess like enough that was the case; somebody had possession of it.
Q. Don't you know?
A. Somebody else had possession; I know that.
Q. Who was it?
A. I understand it was Mrs. Fletcher.
Q. Mrs. Fletcher and Mrs. Eddy?
A. Had possession of that part of the land.
Q. And you thought it was necessary for you to take a handful of dirt?
A. Yes, sir.
Q. What did you do with it?
A. I let him have it; put it in his hand, sir; in Nathan Fuller's hand.
Q. Who told you to?
A. I was instructed by the counsel to do so.
Q. Did you do anything else?
A. Yes; I walked around there, I think.
Q. How long were you on the land?
A. O, I was on there perhaps fifteen minutes; it might have been longer.
Q. Did you do anything else there?
A. I don't remember now of doing anything else there;
43 I might have done something else; but I don't remember what it was, or whether I did or not.

* * * * * * *

And NATHAN FULLER testified:

(By Mr. MOWRY:)

Q. Now, are you the father of Theodore C. Fuller, who testified before the recess?
A. Yes.
Q. Did you receive that deed from him?
A. This one that has been read.
Q. You received that deed that has been read from him?
A. Yes, sir.
Q. Where did you receive that from him?
A. I received it on the land that we claim in Central Falls.
Q. Is it this land in controversy?
A. Yes, sir.
Q. What took place at that time when you received that?
A. Well, we went around the land—all over it, or a good part of it—and on the front on Broad street. I went onto the land on

the west side of the road, and we went through the forms of delivering this to me.

Q. Anything else delivered to you on the land?
A. This deed and the possession of it.
Q. The possession of the land?
A. Of the land.
Q. Anything handed to you besides the deed by Theodore?
A. I think there was; dirt, or something like that.
Q. By whom was the dirt handed to you?
A. Theodore, my son.

Q. When was that; before or after the commencement of
44 this suit?
A. Before.

Cross-examination by Mr. GREENE:

Q. You say he delivered possession; what did he do on the land?
A. He reached down and took up some dirt and handed to me.
Q. Did he do anything more than what you have already told?
A. Not that I know of; I don't remember that he did.

But there was no evidence of any notice to or knowledge of the defendants of these acts, and they both testified that they had no such knowledge or notice.

The defendants objected to the admission of this deed in evidence on the ground that it passed no title, as they were then in adverse possession of the land, and also upon the ground that the deed, upon its face, was void for champerty. The court admitted the deed against these objections; to which admission the defendants then and there duly excepted.

The defendants traced their title to the land in question by continuous chain of title from the deed made by one Jeremiah Richardson, a grandson of the testator, Francis Richardson, to Stephen Jenks, dated April 8th, 1768, of said 22¼-acre parcel, containing full covenants of title and warranty, duly recorded in the land records of said Smithfield, July 10th, 1768, and it was in evidence
45 that said Jeremiah Richardson, who was born September 29th, 1744, was the son of Francis Richardson, Jr., son of the testator, Francis Richardson, named in his will as having deceased before the testator, and had a brother, Francis Richardson 3d, who was born October 8th, 1742, and who had died prior to March, 1766.

It was also in evidence that said Stephen Jenks, by deed dated August 12th, 1796, containing full covenants of warranty, mortgaged the land in question with other adjoining lands, to which, in the meantime, he had acquired title, containing in all, including the land in dispute, about 50 acres, with also one other lot of about 10 acres (one lot of which, to wit, the lot of 20 acres on the diagram annexed, he had purchased in the year 1763 by deed, in which the consideration named was £640, current money, and one other of which, to wit, the 6-acre lot on said diagram, he had purchased in the year 1768 by deed, in which the consideration named was £45,

lawful money), to secure the payment of these notes collectively, amounting to $3,000, and payable, one for $300, on thirty days, and two for $1,350 each, on nine and eighteen months, respectively.

And the said Stephen Jenks died November 16th, 1800, leaving a will, by which he devised, in general terms, without words identifying or having any necessary reference to the land in dispute, or any part of it, all his real estate in North Providence, Smithfield, and elsewhere to his several children; and Stephen Jenks, Jr., his son, who, after the death of his father, had acquired from the other
46 devisees under said will all their right, title, and interest in and to the lands so devised to them, gave a deed, with full covenants of warranty, including in its specific description the land in dispute, with other adjoining lands, to his brother, Jeremiah Jenks, bearing date May 18th, 1804, who was the grandfather and ancestor in title to the lands in dispute of the defendants.

It was also in evidence that the defendants' ancestors in title of the lands conveyed other portions of the said 22¼-acre parcel by deeds, containing full covenants of title and warranty, dated, respectively, Apr. 12th, 1841, Dec. 3d, 1845, and May 21st, 1860, and that the purchasers entered into possession of the respective parcels conveyed to them, and enclosed and improved the same, and that in May, 1864, the father of the defendants, from whom they derive their title, surveyed and platted into house lots the remaining portion of said tract, being the land in question.

It was also in evidence that the defendants' said father, Capt. N. G. B. Dexter, died in the year 1866. It was also in evidence that in the partition of the estate of said Jeremiah Jenks between his heirs-at-law in 1824 the land in question was taken as part of his estate, and platted as such in the partition plat. It also appeared in evidence that the land in question had never been enclosed on the line of the turnpike. The plaintiff introduced several witnesses' testimony tending to prove that there was no fence or wall, or any indications of any fence or wall, anywhere on or around the lot in controversy until 1838, when a fence was put up on the west
47 side by Welcome A. Phillips at his own expense. The defendants introduced the testimony of one witness, Daniel S. Dexter, whose evidence tended to prove that on the southerly line of the land there was once a fence running from the turnpike westerly over the hill to the other side of the ledge, and that the last of this fence disappeared in 1835; also evidence showing that on the westerly line of the land an adjoining owner in 1838 erected a fence at his own expense, and without exaction thereof from the defendants' ancestors in title, and that about 1847 there was a sort of tree fence across several pathways on the northerly line of the land, but there was no other fence on this line until 1857, when a purchaser of adjoining land erected one there.

It also appeared in evidence that the land in question had never been put to cultivation; that prior to 1858 it was covered with woods, except as cut from time to time, as hereinafter stated, and had upon it an extensive ledge and hill of rock running across its center from north to south covered with wood, except at the points

worked; that this ledge was opened by the defendants' ancestors in title as early at least as 1835, one witness swearing that he saw stone taken from there as early as 1830, while another swore that the ledge had not been opened in 1833; that in 1845 or 1846 large quantities of stone were quarried and sold to the railroad companies from this lot by the defendants' ancestors in title, and from that time down to the time of the trial, with longer or shorter intervals, never
48 of more than a year or two, the ledge had been worked or the refuse or chip stone had been removed therefrom by the defendants' ancestors in title, their tenants and lessees, more or less, extensively, and there was no evidence that any other person had ever worked the ledge or taken stone off the lot.

And it was in evidence that Capt. N. G. B. Dexter, the father of the defendants, put up painted signs on the land in dispute, which read: "All persons are forbidden taking wood and stone from this ledge.—N. G. B. Dexter."

It was also in evidence that a lessee of the father of the defendants, in or about 1860 or 1861, built a rough barn and tool shed on the land in question near the ledge for his use in quarrying from the same, such structures being in full view from Broad street, formerly the turnpike; and such lessee on the land there near those structures excavated a well from which he obtained water for the necessary purposes of his business. The barn with lofts for hay was of sufficient capacity to accommodate, and did accommodate, six or eight horses, or more. This barn, with some additions made to it, afterwards remained on the land until some time in 1869, when the same was removed by the lessee.

And it was in evidence that for more than sixty years next, prior to the time of trial neither the defendants nor any of their ancestors in title had lived within three-quarters of a mile of the land in dispute.

There was no evidence showing, or tending to show, that
49 the land in dispute was ever occupied or possessed by the defendants or their privies in title in any other way than as hereinbefore and hereinafter stated.

And the defendants, with the view of showing that Stephen Jenks, senior, who lived and died in North Providence, and his estate were assessed for and paid taxes on the land in question from 1770 to 1805, and that no one of the Fuller family was ever assessed for or ever paid any tax upon the same, put in evidence against the objection of the plaintiff, on the ground of irrelevancy and incompetency, all the original Smithfield tax lists which the legal custodian thereof, as he testified, was able to find covering that period. These tax-lists, several of which were sometimes issued in the same year for different taxes, were for the years 1770, 1772, 1773, 1774, 1775, 1777, 1778, 1779, 1782, 1783, 1784, 1785, 1786, 1787, 1791, 1793, 1794, 1795, 1796, 1797, 1803, 1804, and 1805, and all such lists contained the name of Stephen Jenks, senior, as a person taxed, with the amount of his tax set opposite his name, as well as generally the

word land set opposite thereto; but in no case was the kind or quantity of property taxed designated therein other than as simply land or personal estate, and sometimes there was no designation of this character against the names of different persons who appeared on such lists to be assessed for taxes. The custodian testified that after diligent search the above tax-list of 1770 was the earliest that he was able to find. And in this connection the defendants also put in evidence a list of the polls and estates, real and personal, of the proprietors and inhabitants of the town of Smithfield, called an
50 estimate for taxation for the year 1778, by which it appeared that Stephen Jenks, senior, was listed for 32 acres, designated as wood and waste land, and was also listed for other land, namely, two acres of tillage land and ten acres of pasture land. This estimate list was the only one of the kind found or offered in evidence covering any period anterior to the death of Stephen Jenks, senior. It was also in evidence that this Stephen Jenks, from 1768 until his death, in 1800, was the owner of land in Smithfield, adjoining the land in dispute, and that the land conveyed in and by said deed of Stephen Jenks, junior, to his brother, Jerahmael Jenks, in 1804, consisted of about 32 acres, which appeared in the petition thereof among the heirs-at-law of the latter to be wood land; and there was no evidence tending to show that Stephen Jenks, senior, ever owned any wood or waste land in Smithfield other than the 32 acres listed to him as aforesaid; and there was no evidence that the land in dispute was assessed to any other person, or that any one of the Fuller family was ever assessed for or ever paid any tax upon the same; and it was in proof and it was admitted by the plaintiff that from 1805 to the time of trial the taxes on the land had always been assessed to and paid by the defendants and those from whom they derived their title.

It appeared, from evidence submitted by the plaintiff, that Ezekiel Fuller, in his deed of the 11th of April, 1761, conveying the 20-acre lot delineated on the diagram hereinbefore annexed, recited that such lot was bounded on the north by his former land.

51 There was also evidence tending to prove that the defendants' ancestors in title had cut wood upon the land for their own family uses, more or less, every year from about the year 1829 down to the year 1857, when it was in proof that the father of the defendants, Capt. Nathaniel G. B. Dexter, from whom they derive their title, then cut and took to his own use all the wood of value then remaining on the lot; and there was also evidence from one witness, who testified that he cut wood on this land for Jerahmael Jenks, who died in June, 1821.

But there was also evidence tending to prove that the plaintiff's ancestors and privies in title, members of the Fuller family, between 1826 and 1858, and at varying intervals were in the habit, under claim of title in themselves to the land in dispute, of cutting wood thereon openly in the day time, and in sight of witnesses, for family uses and for the manufacture of baskets, in which business some of the Fullers were engaged, and of carting it off from the land to their houses, under such claim of title, openly through the vil-

lage streets in the day time, and in the presence and sight of witnesses, sometimes with teams, sometimes in wheelbarrows, and sometimes on their backs; and it was also in evidence that on three occasions, in contemplation of taking legal proceedings for establishing their title to said land, some of the Fullers went around and upon said land and pointed out the boundaries of this land, and claimed to own it to the parties who were intending to
52 assist them in such contemplated proceedings, to wit, once in the year 1840, once in the year 1844, and once in the year 1856.

And against the objection and exception of the defendants, on the ground of irrelevancy, immateriality, and inadmissibility, the plaintiff was permitted to show in evidence that in the year 1835 the said Fullers, the plaintiff's ancestors in title, brought an action in the proper court against certain persons, with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼-acre lot delineated on the diagram hereinbefore set forth, and that the same was afterwards, in 1838, discontinued, on account of the poverty and pecuniary inability of the Fullers to carry it on. And the defendants objected to the admission of the copy of the proceedings in said action introduced by the plaintiff, on the ground that it was irrelevant, immaterial, and inadmissible under the issues, but the court ruled the same in, whereupon the defendants duly excepted. And the plaintiff was also permitted to put in evidence against the objection and exception of the defendants the testimony of witnesses that they had been informed that the suit described in said record was discontinued on account of the poverty and pecuniary inability of the plaintiffs to carry it on.

This testimony and the testimony offered by the plaintiff from a large number of witnesses as to the poverty of the plaintiff's *cestuis que trust*, and of those from whom the plaintiff derived title; also statements by members of the Fuller family, and of numerous
53 other persons living in the vicinity of the property, whether connected with either of the parties to the case or not, and unconnected with any act upon the land itself, of the claims of the Fuller family to the land in question, and the general notoriety of the same, and the tradition of this claim in the Fuller family and their claims to other parts of said original 33¼-acre tract were admitted by the court against the objections and exceptions of the defendants as bearing upon the question of the presumption of a lost grant.

But the only evidence tending to show, except general notoriety—but there was no evidence tending to show that the defendants had any knowledge of the notoriety of the Fuller claim, and in their evidence they deny any such knowledge, and the defendants also introduced several witnesses who denied any knowledge of the Fuller claim—any knowledge on the part of the defendants, or those from whom they derive title, of these acts of the plaintiff's ancestors in title was the following from the evidence of Daniel Pearce, examined by the plaintiffs' counsel, Mr. Mowry:

"Q. Did you ever know of the Fullers cutting wood from this place? If so, how many times, and where?

"A. Never but once, and I only saw one of them there then. This was some twenty-odd years ago. I was living in my house on Central street at that time. It must have been nearly thirty years ago. I saw Benjamin Fuller, as I afterwards ascertained it to be. I was going to Valley Falls on what is now Broad street. I met Capt. Nathaniel G. B. Dexter just this side of this lot, and I spoke to him, and he said, I don't know what I shall do with these Fullers; he said they kept coming and carrying off his wood off this lot,
54 and Capt. Dexter left me, and I proceeded on towards Valley Falls, and the man above I saw cutting wood had just come on to the road with a wheelbarrow-full of wood off this lot. I asked him, Benjamin Fuller, if he and Capt. Dexter had been having a duel up in the woods. He said no; he had been cutting wood off his own land, and that Capt. Dexter had sworn pretty hard at him, and that he had sworn as hard at him. I then passed along. He, Benjamin Fuller, was the only one of the Fullers that I ever saw cutting wood on that side of the road, and that was the only time I ever saw him."

And the following evidence from Welcome A. Phillips, called by the plaintiff and examined by his counsel, Mr. Mowry, as follows:

55 (By Mr. MOWRY:)

Q. Did you ever have any conversation with Capt. Dexter with reference to the Fullers getting wood from this land?

A. I think once, and not more than once, to my knowledge.

Q. Well, state that.

A. Capt. Dexter, you all know, dealt in thread and yarn all those days and had a place up on Pleasant street—I think they call it—in Pawtucket; I used to go there frequently to get some yarn for my daughters when they were away from school to knit crochet and one thing and another. One time I remember I went down, and never but once caught the captain in. This time the captain was in. I got my orders and started to go out, and the captain then says to me, "Mr. Phillips, do you see the Fullers on my land there lately?" Says I, "Occasionally I see them on there." He stopped a minute, the captain did, and looked in the fire and says: "There, I don't know what I shall do with those Fullers; I don't know what I shall do with them." Says I, "I will tell you what I would do if I was in your place. You have enough, captain, and to spare, and they are poor, old Uncle Ben in particular, and I never saw them carry off any wood there but brush wood to burn—wood that you wouldn't pay a man for carting off;" and I left the captain in that shape. He didn't make any answer to it whatever, and that is the only conversation that I ever remember of having with Captain Dexter himself.

56 The defendants requested the court to charge the jury as follows:

1st. That under the will of Francis Richardson and the probates of the same in Massachusetts and Rhode Island as put in evidence the plaintiff neither derives nor shows sufficient title to the land in

question to maintain this action, and the plaintiff showing no other title the defendants request the court to charge the jury to find a verdict for the defendants, which instruction the court refused to give.

2nd. Unless the jury find that Mrs. Fuller, senior, was actually seized of the land in question during her life her husband, Ezekiel Fuller, would have no estate by courtesy in it, which instruction the court refused to give, and declined to modify his instruction already given, which was as follows:

If you find that Abigail Fuller or her husband in her right entered into possession of the property under the will of Francis Richardson, and if you find that there was no grant from Abigail Fuller to Jeremiah Richardson or the person from whom he obtained his title, then you will come to the statute of possessions. Of course, gentlemen, if you find that there was an early deed from Abigail Fuller, that is an end of the plaintiff's case. If you find that neither Abigail Fuller nor her husband entered into possession under the devise, then Abigail Fuller couldn't give what she
57 didn't obtain, and that would be an end to the plaintiff's case. Also, if you should find that the land in question here was not the land included in the land deeded from James Reed to Francis Richardson, of course that would be an end to the plaintiff's case. But if you find that the land in question here was part of the land which belonged to Francis Richardson; if you find that Ezekiel Fuller or Abigail Fuller did enter into possession under the devise of Francis Richardson; if you find that there was no early deed or that you cannot presume a grant, then, gentlemen, you will come to the consideration of the statute possessions.

3rd. It is within the province of the jury to presume a lost deed to quiet a title attended by long possession, where they are satisfied that the circumstances of the case require or justify it. And this presumption is not necessarily restricted to what may fairly be supposed to have in fact occurred, but rather to what may have occurred and seems requisite to quiet title in the possession; which instruction the court refused to give and declined to modify his instruction already given, which was as follows:

"But, gentlemen, the defendants under this issue maintain that you have a right to presume an early grant from Ezekiel and Abigail Fuller, or from Abigail Fuller to Jeremiah Richardson, their ancestor's grantor. Of course, gentlemen, if you find that you can presume a grant, if you find from the testimony that there
58 was a lost deed, which passed from Abigail Fuller to Jeremian Richardson or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jenks, that makes the title of the defendants here complete; and the plaintiffs, instead of having shown a legal title, have shown none, because, then, the legal title to the land in question would be in the defendants; and, gentlemen, this is the defence which they set up under the general issue. They say that you have a right to presume that there was a deed which passed from Abigail Fuller to Francis or Jeremiah Richardson.

"Now, gentlemen, that is a question of fact for you to determine. It is undoubtedly true that length of possession going back a great number of years, accompanied by other circumstances, might warrant a jury in presuming a grant or in presuming a lost deed. But, gentlemen, you are to look into the evidence upon that question of a grant, and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony. It is a question for you to determine upon the testimony. Now, gentlemen, the defendants, with respect to this presumption of a grant or a lost deed, present to you a warranty deed which they received from Jere-
59 miah Richardson. They claim that they have paid taxes on this property from 1770 down to the present date. They further maintain that according to the law with respect to the taxation of property the law from 1798 to 1825 was that the land should be taxed to the person who held or occupied it; that from 1825 down to 1855, according to the law, it was to be taxed to the persons who held or occupied it, or to the owners; that the persons who levied the taxes, as officers, are presumed to have done their duty according to law, which is the case.

Now, gentlemen, they further say that the deed from Jeremiah Richardson to Stephen Jenks was a warranty deed; that they have paid the taxes during this length of time; that they have been in possession of this property for over a hundred years; and, gentlemen, they further say, going to show that there may have been an early deed, that the town council proceedings of the town of Smithfield is evidence going to show that at that time Abigail Fuller or her children had no other land in the town of Smithfield, except the lot in question, which was sold under the act of the General Assembly—the six-acre lot. Gentlemen, this is the evidence which the defendants introduce—part of it. I don't pretend to state the whole or in detail going to show you that you have a right to presume upon the testimony; that there was a grant from Abigail Fuller to either Francis or Jeremiah Richardson.

60 But, gentlemen, the plaintiffs, in order to rebut and overcome any such presumption, also bring forward certain considerations or facts. They claim, gentlemen, that in the deed which Francis Richardson made to Stephen Jenks the consideration, which they claim was small, shows that there was something improper about the deed. They also claim that what he recites in that deed that this property had come from his honored grandfather, or words to that effect, also shows that he had no deed, and that his brother had no deed from Abigail Fuller. They also claim, gentlemen, that these children were small at about this time in 1768, or previous to that time—the children of Abigail and Ezekiel Fuller—and that afterwards Abigail intermarried with Benjamin Fuller, and became a married woman, and engaged in bringing up a family from 1779 until 1832. They also claim, gentlemen, that the family was poor, and that in consequence they had not the means to prosecute their rights. They also maintain, gentlemen, that there always has been a tradition in the Fuller family as far back as you can go by any

testimony that this land always did belong to Abigail Fuller, the daughter of Francis Richardson.

Well, gentlemen, these are some of the leading facts upon one side or upon the other, which you will weigh, and such other testimony
61 bearing upon this question, either introduced upon the side of the plaintiffs or the defendants, upon this question of a grant or lost deed; and, gentlemen, you will determine upon that evidence whether there was an early deed from Abigail Fuller to either Francis or Jeremiah Richardson. * * * Then you will consider the question of the presumption of a deed, and whether you can, under the circumstances, presume a deed or not upon the evidence as it is submitted. If you find that there was no lost deed then you will come to the statute of possessions, and you will determine, in the first place, when the possession of the character that I have described began."

4th. That under the statute of possessions of this State, which has been in force here since the year 1728, twenty years uninterrupted, quiet, peaceable, and actual seizen and possession of any land, for and during the said time claiming the same as his, her, or their proper, sole, and rightful estate in fee-simple, creates in the possessor a good and rightful title to the land so occupied, and if at the commencement of any such possession the person holding the title is under disability, such person can only avoid the title so acquired by the adverse occupant by suit commenced within ten years after the removal of the particular disability which existed at the time such possession commenced.

Which instruction the court refused to give, and declined
62 to modify his instruction already given, which was as follows:

"Gentlemen, if you find that the legal estate in this property is in these complainants, if you find that Abigail Fuller, or her husband in her right, entered into possession of the property under the will of Francis Richardson, and if you find that there was no grant from Abigail Fuller to Jeremiah Richardson, or the person from whom he obtained his title, then you will come to the statute of possessions. Of course, gentlemen, if you find that there was an early deed from Abigail Fuller that is an end of the plaintiffs' case. If you find that neither Abigail Fuller nor her husband entered into possession under the devise, then Abigail Fuller couldn't give what she didn't obtain, and that would be an end to the plaintiffs' case. Also, if you should find that the land in question here was not the land included in the land deeded from James Reed to Francis Richardson of course that would be an end to the plaintiffs' case. But if you find that the land in question here was part of the land which belonged to Francis Richardson, if you find that Ezekiel Fuller or Abigail Fuller did enter inio possession under the devise of Francis Richardson, if you find that there was no early deed, or that you cannot presume a grant, then, gentlemen, you will come to the consideration of the statute of possessions. This is the sec-
63 ond defence which the defendants offered here; and, gentlemen, I will read to you two sections of the statute of posses-

sions of the State of Rhode Island." (Reads sections 2 & 3 of chapter 175 of the Public Statutes of Rhode Island.)

Gentlemen, you see there what the statute of possessions in this State is, and it was substantially the same, as is admitted by both sides, during the period covered by this case—that is, gentlemen, under the statute of possessions of Rhode Island a party who enters into the uninterrupted, quiet, peaceable, and actual seizen and possession of lands, claiming the same as their proper, sole, and rightful estate in fee-simple for a period of twenty years, acquired an absolute title to the estate.

There are two exceptions, gentlemen, to this general rule. These exceptions apply to two classes of individuals. The first exception relates to married women, to infants, to persons of unsound mind, and to those beyond the sea, &c. The second class refers to remainder-men or reversioners; that is, if I have an estate in remainder—if there is a life estate ahead of me before I am entitled to the possession of the property, then possession doesn't run against me—only in a certain degree, at least until ten years after the termination of the life estate. And so with the other class of disabilities.

That is, gentlemen, the law is this: Twenty years' uninter-
64 rupted, quiet, and peaceable and actual seizen and possession, claiming the same, gives a good title to land. There are two classes of exceptions—two provisos—namely, infants and married women, persons of unsound mind and others, and, lastly, remainder-men and reversioners, and these two classes of persons under disabilities have ten years after the termination of the disibility within which to prosecute their right of action.

The counsel for the defendants in this case has requested me to charge you that under the law of Rhode Island a person under disibility, especially under the disability of coverture, or others of that class, must bring suit for the possession. But, gentlemen, I shall charge you that the law is that they may enter upon the land and take possession by making a legal claim, as well as by bringing suit. So that, gentlemen, we come down to this: that when persons are under the disability of marriage, or under the disability of a life estate ahead of them, that they have ten years after the disability ceases within which to claim a right to the land, either by entry or by bringing suit.

But, gentlemen, you will bear with me a few minutes longer on this question of the statute of possession, for it is a somewhat com-
plicated question to understand in all its bearings upon the
65 case before us. The statute gives a married woman or a person entitled to estate in remainder ten years after the termination of that disability within which to bring their right of action.

Now, gentlemen, a person under disability is entitled to but one disability under each class. For example: If Abigail Fuller, at the time these parties entered into possession of this land, was an infant, she would have, of course, ten years after the termination of that infancy. If she was an infant until 1778 she would have ten years after the termination of that infancy within which to assert her rights, provided, of course, the defendants had been in the unin-

terrupted, quiet, and peaceable possession for twenty years; but, gentlemen, if she had the benefit of that disability of infancy, and afterwards was married, she couldn't have the benefit of both of those disabilities. She could have simply the benefit of the disability of infancy, which was a disability existing at the time the possession began; but if after the possession began she was married then she couldn't also have the benefit of coverture. But, gentlemen, if at the time the possession began she was under coverture then, of course, she would have the benefit of that disability of coverture. She has the benefit of one disability, and you can't tack one disability upon another, or add to it. Of course, if she had a life estate in her father she would have the benefit, also, of ten years after
66 the death of the life tenant. She would have the benefit of that, and she would have the benefit also of the disability of infancy or of coverture under that particular exception.

And, gentlemen, there is another peculiarity of the statute, and that is, if it begins to run it never ceases. Now, we will suppose that at the time that Abigail Fuller was *femme-sole*, for instance, that is, at the time that Abigail Fuller was a single woman and of full age—twenty-one years of age—that at that time the parties entered into possession of the premises; then a suit having begun to run it would not cease running by reason of her subsequent coverture, although of course, then, gentlemen, she would be entitled to the benefit of remainder within ten years after the life estate. So it is important for you, right at the starting point of this case, with respect to the statute of disabilities, to determine when the possession of these defendants began.

When did their adverse possession begin? I will explain to you presently what adverse possession is. But first, when did it begin?

If, gentlemen, the adverse possession began before the coverture of Abigail Fuller in 1779, what would be the situation? She would have been an infant up to 1778, at least, and would have been only entitled to the disability of infancy, and her right would cease
67 ten years after the disability of infancy ceased. She would not be entitled to any disability of coverture, because she would have the benefit of the disability of infancy, and that would be all, if you find that the defendants entered into possession between 1778 & 1779 and remained in possession, of course, for twenty years—uninterrupted, quiet, and peaceable, and actual possession; but she would only have the benefit of the disability of infancy added to, of course, the benefit of the disability under the other section as to remainder—that is, if her father, having the life estate, died in 1800 she would have a right until 1810 to sue or to make entry.

Therefore, gentlemen, it is all important for you to consider, under this second division of this case, when these defendants entered into the adverse possession of the property, and did they enter into the adverse possession previous to the coverture of Abigail Fuller, in 1779. Of course, gentlemen, if Abigail Fuller had brothers or a sister, the same rule with respect to the disability which I have been explaining would apply to them also. Therefore I say it is all im-

portant for you to consider when the possession of these defendants began, especially with reference to the coverture of Abigail Fuller in 1779.

5th. Uninterrupted payment by the defendants and those under whom they claim of the taxes upon the land in question since 1805, as admitted by the plaintiff, is powerful evidence of the defendant's claim of right to the land.

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Which instruction the court refused to give.

6th. And so if the jury find that Stephen Jenks paid the taxes upon the land in question from the year 1770 until his death it is powerful evidence of his claim of right to the land.

Which instruction the court refused to give.

7th. That if the jury find that the land in question has never been assessed to any of the Fuller family since 1768, and that no one of them has ever paid taxes upon it, it is evidence that they had no rightful claim to it which they jury have the right to consider.

Which instruction the court refused to give.

8th. That by the laws of the State from the year 1798 to the year 1825 the assessors of taxes of the several towns were required to assess the taxes upon real estate to the person who held or occupied the same, and that from 1825 to 1855 to assess either upon the person who held and occupied the lands or upon the owners thereof, and from 1855 to the present time upon the owners; and the presumption is that the assessors performed their duty; that the fact that the taxes since 1805, as admitted by the plaintiff, have been assessed to and paid by the defendants and those under whom they claim is evidence of possession and ownership during that time by the defendants and those under whom they claim which the jury are entitled to consider.

69

Which instruction the court refused to give, and declined to modify the instruction already given, which was as follows: "They (the defendants) claim that they have paid taxes on this property from 1770 down to the present date. They further maintain that, according to the law with respect to the taxation of property, the law from 1798 to 1825 was that the land should be taxed to the person who held or occupied it; that from 1825 down to 1855, according to the law, it was to be taxed to the persons who held or occupied it, or to the owners; that the persons who levied the taxes as officers are presumed to have done their duty according to law, which is the case."

This portion of the charge was given only when instructing the jury upon the question of the presumtion of a lost grant, as stated above under the third request. In the subsequent portion of the charge upon the question of possession the instruction was as folfows: "Now, gentlemen, it is true that the giving of a deed doesn't show possession; that the payment of taxes does not prove possession. The giving of a deed from Jeremiah Richardson to Stephen Jenks doesn't show that they entered into possession, doesn't prove it under that deed—*i. e.*, such adverse possession as the statute calls for—nor does the payment of taxes show it.

70

In order to constitute, gentlemen, an adverse possession there

must be an actual entry upon the land, cultivation of the land, or a building upon the land, or a fencing of the land, and such other notorious or continuous acts of ownership, which go to prove that the party claims to be the owner, and that the possession is of such a character as the land is capable of. Gentlemen, I will repeat that, in order to show adverse possession, the parties in this case must show that they entered upon the land, and that they occupied it, or improved it, or fenced it, or built upon it, or they must show possession by such other notorious, open, continuous acts of possession as the character of the property calls for."

9th. That if the jury find that the defendants and those from whom they derive their title to the land in question have for any twenty years after the death of Benjamin Fuller, in 1852, and prior to the commencement of this suit, been in the uninterrupted, quiet, peaceable, and actual seizen & possession of the lands in question
71 for and during such twenty years, claiming the same as their sole and rightful estate in fee-simple in the lands which could be only awarded by actual possession by the plaintiff or those under whom he claims for a subsequent term of twenty years, and there being no evidence or claim on his part of any such subsequent possession, the defendants would be entitled to a verdict.

Which instruction the court refused to give.

10th. That if the jury find that the defendants and those from whom they derive their title to the land in question have for any twenty years prior to the death of Benjamin Fuller, in 1832, been in the uninterrupted, quiet, peaceable, and actual seizen and possession of the land for and during any such twenty years, claiming the same as his, her, or their property, sole and rightful estate in fee-simple, they thereby acquired a good and rightful title to the land, which could be avoided only by suit brought within ten years after the death of Benjamin Fuller by Mrs. Fuller, grandmother of the plaintiff, or those claiming under her, and the defendants would therefore be entitled to a verdict.

Which instruction the court refused to give.

11th. That if the jury find that such possession by those from whom the defendants derive their title commenced prior to the marriage of
72 Abigail Fuller, grandmother of the plaintiff, and continued for twenty years, they, during that time, claiming the land as their proper, sole, and rightful estate in fee-simple, and also find that her father, Ezekiel Fuller, had a life estate in the lands as tenant by the curtesy, the defendants' ancestors in title thereby acquired a good and rightful title to the land, which could be only avoided by suit by Mrs. Fuller, grandmother of the plaintiff, within ten years after the death of her father, Ezekiel Fuller, and the defendants will then be entitled to a verdict.

Which instruction the court refused to give, and declined to modify the instruction already given, which is cited under the fourth request to charge.

12th. To interrupt possession under a claim of title in fee-simple under the statute of possessions of this State, and to prevent such possession from ripening into title at the end of twenty years, there

must be such acts upon the land itself within such twenty years as practically to interfere with the actual possession and enjoyment of the land by the occupant.

Which instruction the court refused to give, and declined to modify the instruction already given, which was as follows:

"Now, gentlemen, what is possession—such adverse possession as would give these defendants a good title after they had been in such possession for twenty years?

73 The statute says "uninterrupted, quiet, peaceable, actual seizen and possession." You must, therefore, determine upon the evidence whether between 1768 and 1779 the defendants have shown by the testimony that they were in the uninterrupted, quiet, and actual seizen and possession of this property under a claim of right to own the property in fee-simple.

Now, gentlemen, it is true that the giving of a deed doesn't show possession; that the payment of taxes does not prove possession. The giving of a deed from Jeremiah Richardson to Stephen Jenks, doesn't show that they entered into possession; doesn't prove it under that deed—that is, such adverse possession as the statute calls for—nor does the payment of taxes show it. In order to constitute, gentlemen, an adverse possession there must be an actual entry upon the land, cultivation of the land, or a building upon the land, or a fencing of the land, and such other notorious or continuous acts of ownership which go to prove that the party claim to be the owner, and that the possession is of such a character as the land is capable of. Gentlemen, I will repeat that, in order to show adverse possession, the parties in this case must show that they entered upon the land, and that they occupied it, or improved it, or fenced it, or built upon it, or they must show possession by such other notorious, open, continuous acts of possession as the character of the property calls for.

74 Now, gentlemen, in determining whether these defendants had possession between 1768 and 1779, you will determine upon the evidence presented whether they had such possession as I have described. If you find, gentlemen, upon the testimony that they had such possession, then the right of Abigail Fuller would cease, at the latest, in 1810, and, therefore, if you should find that she made no entry or brought no suit prior to 1810 that would bar the plaintiffs. If, gentlemen, you find upon the testimony that no such possession as I have described was made by the defendants prior to 1779, then the coverture of Abigail Fuller would protect her until 1832—that is, if the defendants had made such a possession as I have described after 1779 at that time, Abigail Fuller, being under the disability of coverture, would be protected until 1832, and she would have ten years after 1832 within which to assert her rights; and, gentlemen, if you should find upon the testimony that between 1832 and 1842, provided, of course, you find that Benjamin Fuller died at that time, and that she became a widow then; if, between 1832 and 1842, legal entries were made upon this land by the heirs of Abigail Fuller, or by herself, or by one of the heirs as representing the rest then that would stop the running of the statute for the period of

twenty years; and if you find that entries were made during the
75 first ten years, legal entries—and I will explain what a legal entry is presently—if you find that a legal entry was made between 1832 and 1842, and that there were subsequent legal entries made upon the land down to within a period of twenty years from the beginning of this suit, that would preserve the rights of these plaintiffs until the time of the bringing of this suit.

And if you find that in 1874 Theodore Fuller under a power of attorney went upon the land and delivered a deed to Nathan Fuller with a clod of earth that would be sufficient to keep the title in Nathan Fuller and those whom he represents. Therefore, gentlemen, if you should find that there was a possession such as I have described prior to 1779 by the defendants Abigail Fuller's right would expire in 1810. If you find that there was no such possession previous to that date, then whatever possession there may have been after 1779 down to 1832 *still* Abigail Fuller's right would not expire until ten years after 1832; and if you should find that within that ten years entries were made and at subsequent periods of twenty years down to the beginning of this suit that would keep alive the right of these plaintiffs.

Now, gentlemen, what is a legal entry, a legal entry by a person who has been disseized or put out of possession of property to which he was originally legally entitled or who has a record title; that is, what would constitute a legal entry of the Fullers in this
76 case on the hypothesis that they had the legal title, a title which originally came to them from Abigail Fuller; what would constitute a legal entry after 1832? Well, gentlemen, a legal entry would be where the rightful party goes upon the land visibly, openly, under a claim of right, and exercises acts of ownership upon the land, such as cutting wood, &c.

And, gentlemen, right here let me say, upon the subject of possession and the right of these plaintiffs here, that you will not consider at all the poverty of the Fuller family. Whether they were poor or rich has nothing to do with their asserting in a proper manner, either by suit or otherwise, their right to the possession of the property. Neither, gentlemen, have the claims which the Fullers have made generally in the community to this property any bearing upon the question of whether they made a legal entry on [or] to this property after 1832. Such declarations, gentlemen, as they made at the time that the acts were committed, or about the time that the acts were committed, such declarations as they made going to show the intent with which they entered, are admissible, but the general claim in the community or the general poverty of the Fuller family should in
your minds have no bearing at all upon the question of the
77 assertion of their rights under the statute of possession or of limitations only in this view—that the expressions that they made at the time the acts of interruption were committed, or about the time that they were committed, are admissible as going to show the intent with which it was done and their claim to the property.

Therefore, gentlemen, after 1832, you will consider upon the evidence submitted whether Abigail Fuller or the heirs of Abigail Ful-

ler, or any one of them, made a legal entry upon these premises, and whether, if they made a legal entry within ten years, they continued to make other entries within a period of twenty years, down to the beginning of this suit. And you will remember that it must be an open visible entry, under a claim of ownership; not a secret entry, not going on there occasionally to get a little wood, and not with the intent of claiming, but going upon the land under a claim of ownership, and getting wood and carrying it off."

13th. Mere claims of ownership or title off the land itself, and not accompanying any act upon the land, are not evidence of interruption of the possession, and the jury will not be justified in so considering.

Which instruction the court refused to give, and declined to modify the instruction already given, which is cited under the 12th request to charge.

14th. No such claims of right or title to the land, made
78 after 1825, are any evidence whatever to rebut the presumption of a lost deed prior to 1768.

Which instruction the court refused to give.

15th. Merely occasionally going upon the land in the absence of the party in the actual possession and enjoyment of it, and cutting wood of little value, if unaccompanied by any actual disturbance of the enjoyment of the land by the occupant for all practical purposes, will not, under the statute, work any interruption of the occupants, possession to stay the running of the statute.

Which instruction the court refused to give, and declined to modify the instruction already given, and which is quoted above under the 12th request.

16th. That, so far from claims of right or title made off the land and not accompanying any act upon the land being evidence of interruption of possession, they may be considered by the jury as evidence of such possession by the defendants and those from whom they derive their title, as they tend to show knowledge and recognition by the plaintiff and those under whom he claims that the lands were actually held in possession by somebody else adversely to them.

Which instruction the court refused to give.

79 17th. If the jury find that at the time the deed to the plaintiff of May 24th, 1874, was made the defendants were in the actual possession of the land, claiming the same as their own in fee-simple, the deed was ineffectual as against the defendants to convey to the plaintiff any title to the land under the circumstances attending its delivery disclosed by the evidence.

Which instruction the court refused to give, and he declined to modify the instruction already given, which was as follows:

"And if you find that in 1874 Theodore Fuller under a power of attorney went upon the land and delivered a deed to Nathan Fuller with a clod of earth, that would be sufficient to put the title in Nathan Fuller and those whom he represents."

18th. That by the law of this State the conveyances by a party of land of which he is disseized passes no title as against the disseizor,

and merely going upon the land and there passing the deed to the grantee with a handful of dirt taken from the land without the knowledge of the party in possession, and without actually disturbing his possession and enjoyment of the land, is not sufficient to give effect to the deed as against the party in possession.

Which instruction the court refused to give.

19th. Public officers are presumed to have done their full
80 duty, particularly in transactions that occurred over a hundred years ago. The jury are therefore entitled to consider whether the town committee, who in and about the years 1761 and 1762 were searching for Fuller lands from which to support the children, would not have found and reported the land in question as a part of the estate to be sold for the support of the children of Ezekiel Fuller or his children claiming under his deceased wife — had then any rightful estate in it.

Which instruction the court refused to give, except as contained in that part of charge cited under 4th request.

20th. All acts are presumed to have been rightfully and regularly done, and this applies particularly to transactions of ancient date, and applies to deeds made so many years ago that no living testimony can be adduced respecting them, and the jury may presume that the deed was rightfully made and the possession was rightfully taken and held under it, particularly if they find that the subsequent possession and dealings with the land within the time — capable of existing proof and the payment of taxes upon the land had been consistent with the deed.

Which instruction the court refused to give.

21st. That under the statute of James First, limiting real
81 actions, the right of action of Mrs. Abigail Fuller, Jr., or of her heirs, was barred twenty years, at the latest, from the time when that right of action first accrued, and that cannot be kept open by successive entries. In other words, if the right of action began in 1832, and the jury should find that she or her heirs did enter after 1832, prior to 1842, the right of action would be barred, at the latest, at the end of twenty years from that latter time by the statute of James.

Which instruction the court refused to give.

To each of which rulings, admitting evidence against their objections, as above stated, and to the admission of such evidence, and to each refusal to give the instruction requested, and to the instructions which were given, as above set forth, the defendants duly excepted before the jury retired, and, as the matter thereof did not appear of record, prayed the court to allow and seal this bill of exceptions, which, being found correct, has been allowed and sealed accordingly.

The foregoing bill of exceptions is allowed.

LE BARON B. COLT,
United States Judge.

June 14, 1883.

82 *Writ of Error.*

UNITED STATES OF AMERICA, } 88:
District of Rhode Island, }

[Seal of Circuit Court, Providence.]

The President of the United States of America to the judges of the circuit court of the United States for the first circuit and district of Rhode Island, Greeting:

Because that in the record and process and also in the rendering of a judgment in a suit before you, or some of you, between Nathan Fuller, for self and as trustee, plaintiff, and Lucy W. Fletcher *et al.*, defendant-, in a plea of the case, a manifest error has intervened, to the great damage of the said defendants, as has in their complaint been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are therefore hereby commanded that if judgment thereof should be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the Supreme Court of the United States on the second Monday of October next, at Washington, being the present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, our Chief Justice, at Providence, in said district, this 19th day of June, A. D. 1883.

HENRY PITMAN, *Clerk.*

83 [Endorsed:] Writ of error. Nathan Fuller, trustee, *v.* Lucy W. Fletcher *et al.* Issued June 19th, 1883.

Citation.

84 UNITED STATES OF AMERICA, } 88:
District of Rhode Island, }

[Seal of Circuit Court, Providence.]

The President of the United States of America to the marshal of said district or to his deputy, Greeting:

You are hereby requested to make known to Nathan Fuller, of Haddam, in the State of Connecticut, a citizen of said State of Connecticut, in his own right and as trustee for Truman B. Fuller and others, that in a certain cause in the circuit court of the United States within and for the district of Rhode Island, wherein he was plaintiff and Lucy W. Fletcher *et al.* were defendants, wherein judgment was rendered against the said defendants on the 14th day of June, A. D. 1883, the said defendants have this day sued out a writ of error unto the Supreme Court of the United States next to be holden at Washington, in the District of Columbia, on the second Monday of October next.

And the said Nathan Fuller is therefore cited and admonished to

appear at our supreme court to show cause, if any there be, why the judgment rendered against the said Lucy W. Fletcher *et al.* in said writ of error mentioned should not be corrected, and why speedy justice should not be rendered to the parties in that behalf.

Witness the seal of our said circuit court and my hand this 19th day of June, A. D. 1883.

LE BARON B. COLT,
Judge of the District Court of the United States for the District of Rhode Island.

85 RHODE ISLAND DISTRICT, *sc:*

PROVIDENCE, *June* 27, 1883.

I have this day served this citation as directed on Elisha C. Mowry, Esq., he being of counsel of record, by reading the same to him in his presence and hearing, and by delivering to him a true & attested copy hereof.

JAMES H. COGGESHALL,
U. S. Marshal, Rhode Island Dist.

RHODE ISLAND DISTRICT, *ss:*

PROVIDENCE, *July 23d*, 1883.

I have this day, at the city of Providence, in this district, served the within citation on the Nathan Fuller within named, in his own right and as trustee for Truman B. Fuller and others, by personally delivering to him a true and attested copy of this citation.

JAMES H. COGGESHALL,
U. S. Marshal, Rhode Island Dist.

Fees, 5.12.

DISTRICT OF RHODE ISLAND, *ss:*

On this 24th day July, A. D. 1883, personally appeared the aforenamed James H. Coggeshall, United States marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Elisha C. Mowry, counsel of record, and a like copy to Nathan Fuller, in his own right and as trustee for Truman B. Fuller and others.

Before me—

HENRY PITMAN,
Clerk U. S. Circuit Court.

86 UNITED STATES OF AMERICA, *District of Rhode Island,* } *ss:*

CLERK'S OFFICE, CIRCUIT COURT UNITED STATES,
AT PROVIDENCE, *July 24th*, 1883.

I, Henry Pitman, clerk of the circuit court of the United States for the first circuit and district of Rhode Island, in pursuance of the command contained in the within writ of error, do make return thereof and annex hereto and transmit herewith a true copy of the entire record and of all the proceedings in the cause — Nathan Fuller, for self and trustee, *vs.* Lucy W. Fletcher *et al.*, wherein judgment was rendered in said circuit court of the United States.

I also annex the citation served upon the plaintiff upon the issuing of said writ of error, a copy of which writ was lodged in this office on the nineteenth day of June, A. D. 1883, by the plaintiff in error, for the adverse party.

In testimony whereof I have hereunto set the seal of said court and my hand on this twenty-fourth day of July, A. D. 1883.

[Seal of Circuit Court, Providence.]

HENRY PITMAN, *Clerk.*

Endorsed on cover: Rhode Island C. C. U. S. No. 395. Lucy W. Fletcher *et al.*, plaintiffs in error, *vs.* Nathan Fuller, in his own right and as trustee for Truman B. Fuller *et al.* Filed 11th October, 1883.

120-604

RECEIVED
JAN 17 1887
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1886.

NO. 138.

LUCY W. FLETCHER ET AL., PLAINTIFFS IN ERROR,

vs.

NATHAN FULLER, IN HIS OWN RIGHT, AND AS TRUSTEE FOR TRUMAN B. FULLER ET AL.

In Error to the Circuit Court of the United States for the District of Rhode Island.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES HART,
WM. H. GREENE,
JAMES TILLINGHAST,
Counsel for Plaintiffs in Error.

120-534

FILED
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JAMES H. McKENNEY
CLERK

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LUCY W. FLETCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NATHAN FULLER, IN HIS OWN RIGHT AND AS TRUSTEE FOR TRUMAN B. FULLER, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF THE CASE.

This action was trespass and ejectment, brought by the defendant in error, to recover possession of $\frac{3}{16}$ undivided parts of a lot of land containing about fourteen acres of land situated in the town of Lincoln (formerly Smithfield), in said district. The declaration contained several counts in the usual form, but all were withdrawn except the last two, the fifth and sixth, upon which alone the case went to the jury. The defendants pleaded the general issue and twenty years' possession under the statute, upon which issues were joined, and the case was tried upon these issues and upon the written stipulation between the parties respecting this second plea and the evidence admissible under the same, a copy of which appears in the record, the body of which copy is in these words:

"In the above case it is a greedthat the plea of the Statute of Possessions now on file therein shall be held to apply to any period or periods of twenty years that could be covered by any other like plea or pleas that might be or might have been filed therein, and that either party

may offer any evidence and rely upon any matters that would be admissible under any such plea or pleas, and any proper replications and other pleadings thereon." [Record, 6.]

It was in evidence that the land in question was of the value of upwards of $19,000 (nineteen thousand dollars), and was the westerly portion of what was formerly a tract said to contain about 33⅓ acres, which was bounded easterly on Blackstone or Pawtucket river, and through which the Valley Falls turnpike, or Broad street, so called, running northerly and southerly, was opened about the year 1816. This tract of 33⅓ acres was formerly owned by one James Reed, and by the early conveyances became divided into three parcels, as shown by the diagram showing the relative location of the lands submitted to the jury by the consent of the parties, of which the following is a reduced copy.

(Here follows diagram marked p. 20.)

The 22¼-acre parcel was conveyed to Francis Richardson, of Attleborough, Massachusetts, by deed, dated April 10th, 1750, and the land in question is the westerly portion of this parcel lying west of the turnpike, as afterwards opened through the same, as above stated. The 5½-acre parcel was conveyed to Ezekiel Fuller by deed dated November 17th, 1750; the 6-acre parcel was conveyed to Abigail Fuller, wife of said Ezekiel and daughter of said Francis Richardson, by deed dated January 21st, 1756.

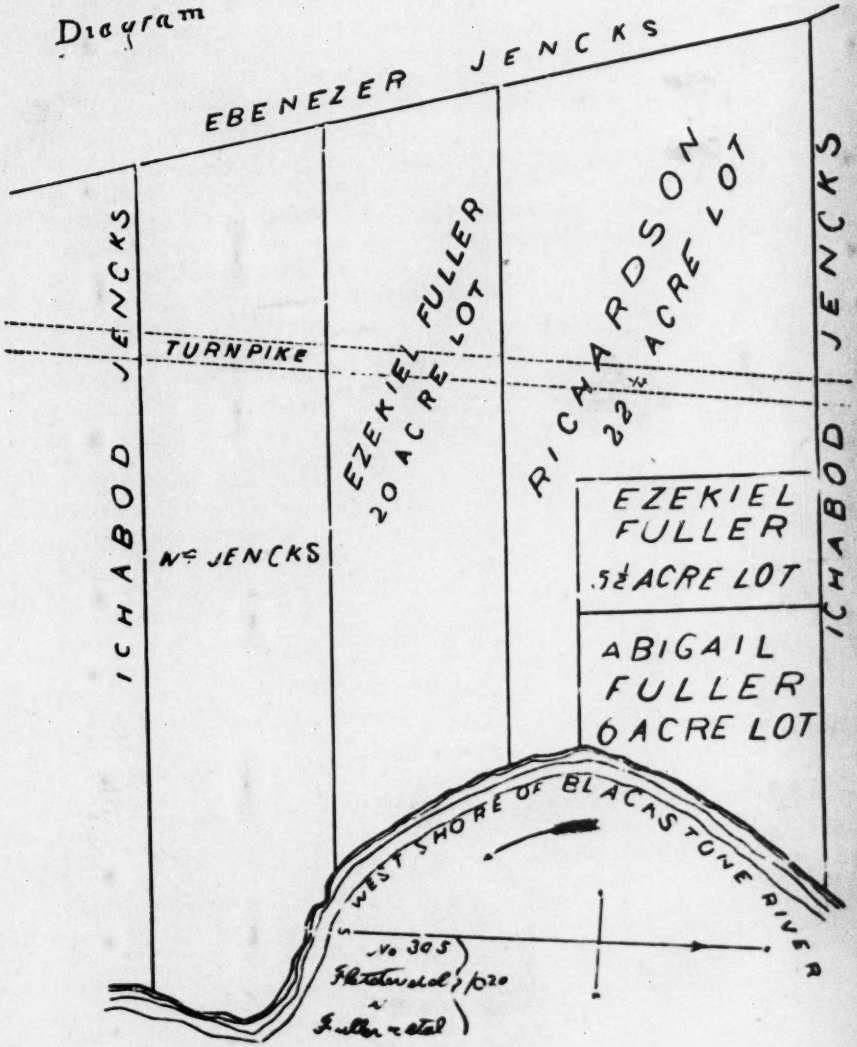
The plaintiff claimed to derive his title under the will of said Francis Richardson, dated May 26th, 1749, and the codicil thereto, dated August 10th, 1750, admitted to probate in Massachusetts, January 19, 1756.

And the plaintiff offered in evidence to prove his title a copy of said will and codicil and Massachusetts probate, with the record of the due filing and recording of the same upon the 27th day of August, 1881, in the probate office in the town of Lincoln (formerly Smithfield), in the State of Rhode Island, where said land is situate, all duly certified by the clerk of the probate court of said town upon said papers offered in evidence as aforesaid, and showed and offered proof of no other title.

The defendants objected to the admission of these in evidence, the same not having been filed nor admitted to probate in Rhode Island until after the commencement of this suit; but the court admitted them in evidence; to which the defendants then and there duly excepted.

By the codicil to this will the said 22¼-acre parcel was devised to the daughter of said testator, Abigail Fuller, wife of said Ezekiel Fuller, from whom the plaintiff proved descent of himself and those from whom he claimed to derive his title. It was also in proof that this Abigail Fuller died prior to the year 1766, and there was evidence which the plaintiff claimed, but which the defendants denied, tended to show that Abigail Fuller died prior to June, 1761, leaving her husband, said Ezekiel Fuller, surviving her. And there was evidence tending to show that said Abigail Fuller and her husband, said Ezekiel Fuller, entered into possession of the property so devised under said will and codicil.

Diagram


EBENEZER JENCKS
ICHABOD JENCKS
TURNPIKE
EZEKIEL FULLER 20 ACRE LOT
RICHARDSON 22 ACRE LOT
ICHABOD JENCKS
Nº JENCKS
EZEKIEL FULLER .52 ACRE LOT
ABIGAIL FULLER 6 ACRE LOT
WEST SHORE OF BLACKSTONE RIVER
No 305
Plat surveyed 1920
Fuller et al

It was also in proof that said Ezekiel Fuller left for parts unknown some time in 1761, and that thereupon the following proceedings were had by the town council of said Smithfield and the General Assembly of Rhode Island relative to the support of two of his children:

Copy of the Records of the Town Council of Smithfield, Reciting the Doings of the Council Respecting the Support, by the Town, of Ezekiel and Abigail Fuller's Children, and Respecting Estate in the Fuller Family.

At a town council held in Smithfield, in the county of Providence, &c., on the 15th day of September, 1761.

Whereas *there is* two of the children of Ezekiel Fuller, late of Smithfield, are at this time and likely still to be chargeable unto the town of Smithfield; and the said Ezekiel is gone, we know not where, and but little or nothing of the said Ezekiel's estate to be found to support them but th*e*re a-sumption of some estate belonging to the said Ezekiel *sureated;* therefore it is voted that Mr. Jeremiah Mowry be appointed, and he is hereby appointed, to make proper enquiry and search unto and after the aforesaid premises, together with somewhat of land there is belonging to the family of the said Ezekiel, and secure the same for the support of the said children.

At a town council held in Smithfield, in the county of Providence, &c., on the first Monday in January, 1762.

Present: Thomas Steere, president; Ezekiel Angell, Daniel Mowry, Esq., David Comstock, Esq.

An order given for £3, 18, 0.

Whereas Jeremiah Mowry, one of the overseers, presented an account for the keeping of Francis Fuller by Mary Fuller 31 weeks, to the amount of 3, 18, 0, lawful money, which acc't was allowed and ordered to be paid out of the town treasury:

Voted that Mr. Jere. Mowry put out the said Francis at the best lay that may be.

An order given for £3, 13, 0.

Whereas Mr. Jere. Mowry, one of the overseers, presented an acc't against the town of Smithfield, by him charged for keeping Abigail Fuller from ye 30th day of June, 1761, until the 4th day of Jan'y, 1762, by John Williams, to the amount of 3, 13, 0, lawful money, which sum is allowed and ordered to be paid out of the town treasury.

At a town coun*sel* held in Smithfield, in the county of Providence, &c., according to adjournment, on the first Monday of March, A. D. 1762.

Whereas one Ezekiel Fuller, late of Smithfield, in the county of Providence, &c., who went abroad the last summer, where to is uncertain, *he* left two or three small children, which are, and still likely to be, chargeable unto the town of Smithfield aforesaid, and nothing of the said Fuller's estate to maintain the same left behind but a small piece of land; therefore,—can have no relief for the supportment of said children without the favor and grant of the General Assembly to

be enabled to sell and give a deed of the aforesaid piece of land. Whereupon it is voted by this council that Daniel Mowry, Jr., [be] and he is hereby, chosen and appointed to lay the premises before the General Assembly of this colony, and request that they would pass an act to enable some proper person to dispose of the aforesaid piece of land, clothing him with authority to give *and* deed therefore.

At a town council held in Smithfield, in the county of Providence, &c., by warrant from under the hand & seal of Thomas Steere, Esq., president, on the 11th day of July, A. D. 1763.

Whereas Jeremiah Mowry, one of the overseers of the poor, informed this council one Francis Fuller, son of Ezekiel Fuller, of Smithfield, &c., which is at this time and has been some time heretofore chargeable to said overseer, has agreed with one Samuel Fuller, of Attleborough, that he keep the said Francis for two shillings, lawful money, per week, which sum is allowed and ordered to be paid out of the town treasury, and likewise consented that said Mowry agree at the same rate awhile longer until further orders.

And that Abigail Fuller, daughter of the said Ezekiel, be provided for in the like manner, with some proper person that doth present.

At a town council, held in Smithfield, in the county of Providence, &c., according to adjournment, on the 15th day of August, A. D. 1763—

Voted, that Mary Fuller be allowed and paid out of the town treasury the sum of two shillings, lawful money, per week from the 1st Monday of January, 1762, until this date, it being for keeping of Francis Fuller, and that there be no more money allowed for maintainance of said Francis without a further agreement made by one or both of the overseers of the poor.

At a town council held at Smithfield, in the county of Providence, the 9th day of April, A. D. 1764, *meet* according to their last adjournment.

Whereas Thomas Steere, Ezekiel Angell, William Jencks, and Daniel Mowry, members of the town council, hired eight dollars of Preserved Harris to pay unto Mary Fuller for keeping of Francis Fuller, for which sum we, the aforesaid members, promise to pay ten per cent. interest until paid unto the aforesaid Preserved.

It is agreed between Mary Fuller, of Attleborough, and the town council, that the said Mary take by indenture Francis Fuller, a poor child of Ezekiel Fuller, which is chargeable to the town of Smithfield, and for her reward therefor she is to have fifty-seven dollars for the maintenance thereof, together with what is already due from said town to said Mary.

Dated April 9th, 1764.

her
MARY x FULLER.
mark.

DAN'L MOWRY, Jun'r, *C. Cl'k.*

Received April 9th, 1764, of the town council of Smithfield, eight Spanish mill dollars, in part for keeping Francis Fuller.

Witness: her MARY x FULLER. mark.

At a town council held in Smithfield, in the county of Providence, &c., by adjournment, on the 15th day of September, A. D. 1767, and 7th year of his Majesty's reign—

Voted, that Mr. Stephen Whipple proceed, sell, and dispose of all the land belonging unto Ezekiel Fuller, late of Smithfield, all the said land situate in said Smithfield; that the fee appears to be in said Fuller, and when he, the said Whipple, hath negotiated said business, to transmit a state of the case before this council, agreeable to an act of General Assembly passed at South Kingstown in February, 1766.

Petition to the General Assembly, Feb. 1766, *by Daniel Mowry, Jr., Asking that Some Person may be Appointed to Sell and Deed the Land of Ezekiel and Abigail Fuller for the Support of their Children. Resolution of Assembly.*

To the honourable General Assembly now sitting at South Kingstown in and for the colony of Rhode Island, on the last Monday of February, A. D. 1766, Daniel Mowry, Jun., of Smithfield, in the county of Providence, humbly shows:

That one Ezekiel Fuller, late of said Smithfield, hath absconded and left this colony, and hath left two small children, which are and have been chargeable to the said town.

And whereas the said Ezekiel hath left no visible estate except some land lying in said Smithfield, whereof the said Ezekiel was possessed in right of his late deceased wife, by whom he had the aforesaid children, *and* thereupon the town council of said town have empowered and ordered the said Daniel to lay this matter before the Assembly, praying aid that said estate may be sold and disposed of to the best advantage to and for the support and maint*a*inance of said children.

Wherefore the said Daniel humbly prays that by an act of this Assembly some person may be appointed to sell and dispose of the whole of said estate for the purposes aforesaid, and that a deed or deeds by such person given shall make and vest in the purchaser or purchasers all such rights and interests in and unto the premises as the said Ezekiel and wife could or might lawfully convey.

DANIEL MOWRY, JR.

(Endorsed.)

FEBRUARY 26TH, 1766.

To the House of Majesties.

GENT.:

Resolved, That the within petition be granted, and that the town treasurer of said Smithfield (by and with the consent and advice of the

town council of said town) be, and he is hereby, empowered to sell and dispose of the said land, and that the money arising therefrom be applied for the purposes set forth in said petition.

Voted and past.

P. order: J. LYNDON, *Cler.*

In the upper house.

Read the same day and concurred in with this amendment—that the money arising from the sale of said land be lodged in the town treasury for said purposes.

G 1. Daniel Mowry's petition.

By order: HENRY WARD, *Sec'ry.*

Read the same day in the lower houses and concerred [in].

P. order: J. LYNDON, *Cler.*

And that thereupon the town treasurer made the following deed of the 6-acre parcel of land aforesaid:

Deed. Stephen Whipple, Town Treasurer, to David Kennedy, March 30th, 1768.

Consideration, £30. Recorded April 19th, 1768.

Stephen Whipple, &c., town treasurer of Smithfield, &c. * * *

I, the said Stephen Whipple, in my said capacity, by, from, and under the power and authority to me given and granted by the honorable the General Assembly of the Governor and company of said colony, begun and holden by adjournment at South Kingstown, within and for said colony, on the last Monday in February, in the year of our Lord one thousand seven hundred and sixty-six, and sixth year of his Majesty's reign (and by and with the consent and advice of the town council of Smithfield aforesaid), for and in consideration of, &c., * * paid by David Kennedy, of North Providence, &c., convey and confirm unto him, the said Kennedy, his heirs and assigns, forever, a certain tract of land in Smithfield, and late possessed and improved by one Ezekiel Fuller, of said Smithfield, husbandman, in the right of his late wife, Abigail Fuller, deceased, containing six acres, and is bounded as follows: Beginning at the northeast corner at a stake and stones at the westerly bank at side of Pawtucket river (so called), and is a corner of land belonging to Ichabod Jenks; thence extending southerly by the bank of said river thirty-five rods to another stake and stones for a corner; thence extending westerly, bounded southerly with land now claimed by Francis Richardson, about 39 rods to a stake and stones for a corner; thence extending northerly on a straight line about 35 rods to stake and stones for a corner, standing in the line of land belonging to the said Ichabod Jenks; from thence extending easterly on a straight line with land belonging to the said Ichabod Jenks to the first-men-

tioned corner. However, it is the true intent and meaning of the grantor and grantee in these presents that the northerly and southerly lines from said river shall extend westerly of equal length so many rods as shall make said tract of land herein and hereby conveyed the exact complement of six acres, covenants of warrantry, &c., inserted.

It was also in proof that said Abigail left four sons and a daughter surviving, namely: Ezekiel Fuller, born January 1st, 1751; Isaiah Fuller, born March 19th, 1753; George Fuller, born September 27, 1755; Abigail Fuller, born December 29th, 1757, and Francis Fuller, the date of whose birth was unknown, and who, with his sister Abigail, was mentioned in the town council records of said Smithfield in 1762 as small children supported by the town.

All these children, excepting the daughter, Abigail, Jr., died intestate and without issue some time prior to the death of their father, who died at the poor-house in said Attleborough in or about July, 1800. Said Abigail, Jr., who was the grandmother of the plaintiff, attained the age of twenty-one years December 29th, 1778, and married Benjamin Fuller December 1st, 1779. Said Benjamin Fuller died in 1832, and said Abigail, Jr., survived him and died in 1835 intestate. [Record, 10–15.]

To prove his title the plaintiff offered in evidence the power of attorney and the deed from all the other heirs (except one) of said Abigail, Jr., to himself, he being also one of said heirs, bearing date the 24th day of May, 1874, of which the following are copies:

* * * * * * *

Know all men by these presents that we, Truman B. Fuller, of Rehoboth, in the county of Bristol and Commonwealth of Massachusetts, and Ruth S. Fuller, wife of said Truman B.; Joseph R. Fuller, of Lincoln, in the county of Providence and State of Rhode Island, and Harriet Fuller, wife of said Joseph R., &c.,

* * * * * * *

[Here follow the names of the other heirs.—Record, 15.]

* * * * * * *

do hereby make, constitute, and appoint Theodore C. Fuller, of said Pawtucket, our true, sufficient, and lawful attorney for us and each of us, and in our and each of our names, to grant, bargain, and to sell all our right, title, and interest in and to all that certain tract of land lying and situate in the said town of Lincoln—known as the Fuller land—which was conveyed to Francis Richardson by deed from James Reed, bearing date April (10th) tenth, A. D. one thousand seven hundred and fifty (1750), and recorded in the records of land evidence of the old town of Smithfield, in said county of Providence and State of Rhode Island, in book No. (3) three, pp. 31 and 32, reference to which deed is here had for a more particular description of the premises; said tract of land being the same that was devised to Abigail Fuller, wife of Ezekiel Fuller, by said Francis Richardson in and by his "last will and testament" duly proved January 19th, 1756, in the probate court of Bristol county, Massachusetts, to said Nathan Fuller.

To have and to hold the same unto the said Nathan Fuller, his successors and assigns, in fee upon the trusts nevertheless, and to and for the uses and interests and purposes hereinafter named, limited and described—that is to say, upon trust to take and prosecute to final conclusion all legal proceedings which he may be advised are necessary to recover possession of the above-described premises, for our benefit and the benefit of each of us, and to employ Thomas A. Jencks, of said Cumberland; Livingston Scott, of the city and county and State of New York, and James C. Collins, of North Providence, in said county of Providence and State of Rhode Island, and Elisha C. Mowry, of said Providence, as his attorneys and counsellors, to conduct said proceedings, and upon such terms as he and they shall agree, and to make such compromises of said actions and proceedings and of our and each of our claims to said land as he and his said counsel deem for the best interests of us and each of us, and to make all sales and conveyances of said land necessary for the payment of the fees of said counsel and the expenses and disbursements incurred in prosecuting our claims to said land; and we authorize said Theodore C., for us and each of us, and in our and each of our names, to make, execute, acknowledge, and deliver a good and sufficient deed and conveyance for the same and upon the trusts hereinbefore declared.

In witness whereof we have hereunto set our hands and seals this 24th day of May, one thousand eight hundred and seventy-four.

Signed, sealed and delivered in presence of Elisha C. Mowry, except as to signature of W. J. Smith.

TRUMAN B. FULLER, [L. S.]

* * * * * * *

[Here follow names of the other heirs, and certificates of acknowledgments—Record, 17-18.]

* * * * * * *

Received for record Oct. 21st, 1874, at 9 o'clock a. m.

* * * * * * *

Know all men by these presents that we, Truman B. Fuller, of Rehoboth, in the county of Bristol and Commonwealth of Massachusetts, and Ruth S. Fuller, wife of said Truman B.; Joseph R. Fuller, of Lincoln, in the county of Providence and State of Rhode Island, and Harriet B. Fuller, wife of said Joseph R., &c.

* * * * * * *

[Here follow names of other heirs—Record, 18–19.]

* * * * * * * *

for and in consideration of the sum of ten dollars to us paid by Nathan Fuller, of Haddam, in the county of Middlesex and State of Connecticut, the receipt whereof we do hereby acknowledge, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said Nathan Fuller and to his successors and assigns forever all our right, title, and interest in and to—

A certain tract of land situate in said town of Lincoln, known as

the Fuller land, which was conveyed to Francis Richardson by deed from James Reed, bearing date April (10th) tenth, A. D. one thousand seven hundred and fifty (1750), and recorded in the records of land evidence of the old town of Smithfield, in said county of Providence and State of Rhode Island, in Book No. 3, pp. 31 and 32, reference to which deed is here had for a more particular description of the premises; said tract of land being the same that was devised to Abigail Fuller, wife of Ezekiel Fuller, by said Francis Richardson, in and by his last will and testament, duly proved in the probate court of Bristol county, in said Commonwealth of Massachusetts, on the 19th day of January, A. D. one thousand seven hundred and fifty-six, reference to which land records and to the records of said court is here had for a more particular description of the premises hereby conveyed.

To have and to hold the same, with all the rights and privileges thereunto belonging to him, the said Nathan Fuller, his successors and assigns forever, in fee upon the special trusts nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described, and declared—that is to say, upon trust to take all legal proceedings that he may be advised are necessary and proper for recovering possession of the above-described premises for the benefit of the grantors hereinafter named, and to that end to employ Thomas A. Jencks, of Cumberland aforesaid; Livingston Scott, of the city, county and State of New York; James C. Collins, of North Providence, in said county of Providence and State of Rhode Island, and Elisha C. Mowry, as his attorneys and counsellors to conduct said proceedings, and upon such terms as he and they shall agree, and to make such compromises of all legal proceedings and of the claims of said parties named as grantors herein to the above-described premises as he and said counsel shall deem to be for the best interests of the said grantors, and to make all sales and conveyances of said premises necessary for the payment of the fees of such counsel and the expenses and disbursements incurred in the prosecution of said claims.

In witness whereof, I, Theodore C. Fuller, in pursuance of a letter of attorney hereunto annexed, bearing date the 24th day of May, A. D. one thousand eight hundred and seventy-four, have set the hands and seals of the parties hereinbefore named as grantors.

Signed, sealed and delivered in presence of—

TRUMAN B. FULLER [L. S.], by his att'y, Theodore C. Fuller.

* * * * * * *

[Here follow names of other heirs, and certificate of acknowledgment—Record, 20-21.]

* * * * * * *

Recorded Oct. 21st, 1874, at 9¼ o'clock a. m.

The testimony as to the delivery of this deed was as follows:

THEODORE C. FULLER testified:

* * * * * * *

Q. I will ask you what you did under that power that you got—in execution of this power?
A. I took possession.
Q. How?
A. Made entry; went up there on the land.
Q. Made entry upon this lot, did you?
A. Yes, sir.
Q. Upon this lot?
A. Yes, sir.
Q. While upon that lot making entry what did you do?
A. I gave Nathan Fuller possession of that property by deed.
Q. You passed that deed over to him of the property, did you?
A. Yes, sir.

Cross-examination by Mr. GREENE:

Q. You say you went on the land?
A. Yes, sir.
Q. Who was present?
A. Nathan Fuller was present.
Q. Who else?
A. That is my father.
Q. Who else?
A. Mr. Mowry, Daniel G. ——, and Mr. Collins there, who sits side of you.
Q. Mr. Scott?
A. No, sir.
Q. What did you do on the land?
A. I passed the deed to my father and took possession of the land; made entry.
Q. Did you do anything more than to step on the land and to pass the deed to him?
A. I think I took up some dirt in my hand also and passed to him.
Q. You took up some dirt in your hand?
A. Yes, sir.
Q. Who told you to do that?
A. I was instructed by the counsel to do it, sir.
Q. For what purpose? Was it or not because somebody else was in adverse possession of the property?
A. I guess like enough that was the case; somebody had possession of it.
Q. Don't you know?
A. Somebody else had possession; I know that.
Q. Who was it?
A. I understand it was Mrs. Fletcher.
Q. Mrs. Fletcher and Mrs. Eddy?
A. Had possession of that part of the land.
Q. And you thought it was necessary for you to take a handful of dirt?

A. Yes, sir.
Q. What did you do with it?
A. I let him have it; put it in his hand, sir; in Nathan Fuller's hand.
Q. Who told you to?
A. I was instructed by the counsel to do so.
Q. Did you do anything else?
A. Yes; I walked around there, I think.
Q. How long were you on the land?
A. O, I was on there perhaps fifteen minutes; it might have been longer.
Q. Did you do anything else there?
A. I don't remember now of doing anything else there; I might have done something else; but I don't remember what it was, or whether I did or not.

* * * * * * *

And NATHAN FULLER testified:

(By Mr. Mowry:)

Q. Now, are you the father of Theodore C. Fuller, who testified before the recess?
A. Yes.
Q. Did you receive that deed from him?
A. This one that has been read.
Q. You received that deed that has been read from him?
A. Yes, sir.
Q. Where did you receive that from him?
A. I received it on the land that we claim in Central Falls.
Q. Is it this land in controversy?
A. Yes, sir.
Q. What took place at that time when you received that?
A. Well, we went around the land—all over it, or a good part of it—and on the front on Broad street. I went onto the land on the west side of the road, and we went through the forms of delivering this to me.
Q. Anything else delivered to you on the land?
A. This deed and the possession of it.
Q. The possession of the land?
A. Of the land.
Q. Anything handed to you besides the deed by Theodore?
A. I think there was; dirt, or something like that.
Q. By whom was the dirt handed to you?
A. Theodore, my son.
Q. When was that; before or after the commencement of this suit?
A. Before.

Cross-examination by Mr. GREENE:

Q. You say he delivered possession; what did he do on the land?

A. He reached down and took up some dirt and handed to me.
Q. Did he do anything more than what you have already told?
A. Not that I know of; I don't remember that he did.

But there was no evidence of any notice to or knowledge of the defendants of these acts, and they both testified that they had no such knowledge or notice.

The defendants objected to the admission of this deed in evidence on the ground that it passed no title, as they were then in adverse possession of the land, and also upon the ground that the deed, upon its face, was void for champerty. The court admitted the deed against these objections; to which admission the defendants then and there duly excepted.

The defendants traced their title to the land in question by continuous chain of title from the deed made by one Jeremiah Richardson, a grandson of the testator, Francis Richardson, to Stephen Jenks, dated April 8th, 1768, of said 22¼-acre parcel, containing full covenants of title and warranty, duly recorded in the land records of said Smithfield, July 10th, 1768, and it was in evidence that said Jeremiah Richardson, who was born September 29th, 1744, was the son of Francis Richardson, Jr., son of the testator, Francis Richardson, named in his will as having deceased before the testator, and had a brother, Francis Richardson 3d, who was born October 8th, 1742, and who had died prior to March, 1766.

It was also in evidence that said Stephen Jenks, by deed dated August 12th, 1796, containing full covenants of warranty, mortgaged the land in question with other adjoining lands, to which, in the meantime, he had acquired title, containing in all, including the land in dispute, about 50 acres, with also one other lot of about 10 acres (one lot of which, to wit, the lot of 20 acres on the diagram annexed, he had purchased in the year 1763 by deed, in which the consideration named was £640, current money, and one other of which, to wit, the 6-acre lot on said diagram, he had purchased in the year 1768 by deed, in which the consideration named was £45 lawful money), to secure the payment of three notes collectively, amounting to $3,000, and payable, one for $300, on thirty days, and two for $1,350 each, on nine and eighteen months, respectively.

And the said Stephen Jenks died November 16th, 1800, leaving a will, by which he devised, in general terms, without words identifying or having any necessary reference to the land in dispute, or any part of it, all his real estate in North Providence, Smithfield, and elsewhere to his several children; and Stephen Jenks, Jr., his son, who, after the death of his father, had acquired from the other devisees under said will all their right, title and interest in and to the lands so devised to them, gave a deed, with full covenants of warranty, including in its specific description the land in dispute, with other adjoining lands, to his brother, Jerahmael Jenks, bearing date May 18th, 1804, who was the grandfather and ancestor in title to the lands in dispute of the defendants.

It was also in evidence that the defendants' ancestors in title of the lands conveyed other portions of the said 22¼-acre parcel by deeds, containing full covenants of title and warranty, dated, respectively, Apr. 12th, 1841, Dec. 3d, 1845, and May 21st, 1860, and that the purchasers entered into possession of the respective parcels conveyed to them, and enclosed and improved the same, and that in May, 1864, the father of the defendants, from whom they derive their title, surveyed and platted into house lots the remaining portion of said tract, being the land in question.

It was also in evidence that the defendants' said father, Capt. N. G. B. Dexter, died in the year 1866. It was also in evidence that in the partition of the estate of said Jerahmael Jenks between his heirs-at-law in 1824 the land in question was taken as part of his estate, and platted as such in the partition plat. It also appeared in evidence that the land in question had never been enclosed on the line of the turnpike. The plaintiff introduced several witnesses' testimony tending to prove that there was no fence or wall, or any indications of any fence or wall, anywhere on or around the lot in controversy until 1838, when a fence was put up on the west side by Welcome A. Phillips at his own expense. The defendants introduced the testimony of one witness, Daniel S. Dexter, whose evidence tended to prove that on the southerly line of the land there was once a fence running from the turnpike westerly over the hill to the other side of the ledge, and that the last of this fence disappeared in 1835; also evidence showing that on the westerly line of the land an adjoining owner in 1838 erected a fence at his own expense, and without exaction thereof from the defendants' ancestors in title, and that about 1847 there was a sort of tree fence across several pathways on the northerly line of the land, but there was no other fence on this line until 1857, when a purchaser of adjoining land erected one there.

It also appeared in evidence that the land in question had never been put to cultivation; that prior to 1858 it was covered with woods, except as cut from time to time, as hereinafter stated, and had upon it an extensive ledge and hill of rock running across its center from north to south covered with wood, except at the points worked; that this ledge was opened by the defendants' ancestors in title as early at least as 1835, one witness swearing that he saw stone taken from there as early as 1830, while another swore that the ledge had not been opened in 1833; that in 1845 or 1846 large quantities of stone were quarried and sold to the railroad companies from this lot by the defendants' ancestors in title, and from that time down to the time of the trial, with longer or shorter intervals, never of more than a year or two, the ledge had been worked or the refuse or chip stone had been removed therefrom by the defendants' ancestors in title, their tenants and lessees, more or less, extensively, and there was no evidence that any other person had ever worked the ledge or taken stone off the lot.

And it was in evidence that Capt. N. G. B. Dexter, the father of the defendants, put up painted signs on the land in dispute, which read:

"All persons are forbidden taking wood and stone from this ledge.—N. G. B. Dexter."

It was also in evidence that a lessee of the father of the defendants, in or about 1860 or 1861, built a rough barn and tool shed on the land in question near the ledge for his use in quarrying from the same, such structures being in full view from Broad street, formerly the turnpike; and such lessee on the land there near those structures excavated a well from which he obtained water for the necessary purposes of his business. The barn with lofts for hay was of sufficient capacity to accommodate, and did accommodate, six or eight horses, or more. This barn, with some additions made to it, afterwards remained on the land until some time in 1869, when the same was removed by the lessee.

And it was in evidence that for more than sixty years next, prior to the time of trial neither the defendants nor any of their ancestors in title had lived within three-quarters of a mile of the land in dispute.

There was no evidence showing, or tending to show, that the land in dispute was ever occupied or possessed by the defendants or their privies in title in any other way than as hereinbefore and hereinafter stated.

And the defendants, with the view of showing that Stephen Jenks, senior, who lived and died in North Providence, and his estate were assessed for and paid taxes on the land in question from 1770 to 1805, and that no one of the Fuller family was ever assessed for or ever paid any tax upon the same, put in evidence against the objection of the plaintiff, on the ground of irrelevancy and incompetency, all the original Smithfield tax lists which the legal custodian thereof, as he testified, was able to find covering that period. These tax-lists, several of which were sometimes issued in the same year for different taxes, were for the years 1770, 1772, 1773, 1774, 1775, 1777[2], 1778[6], 1779[6], 1782[5], 1783, 1784[2], 1785[4], 1786[2], 1787[2], 1791[2], 1793[2], 1794[2], 1795, 1796[2], 1797[2], 1803, 1804, and 1805, and all such lists contained the name of Stephen Jenks, senior, as a person taxed, with the amount of his tax set opposite his name, as well as generally the word land set opposite thereto; but in no case was the kind or quantity of property taxed designated therein other than as simply land or personal estate, and sometimes there was no designation of this character against the names of different persons who appeared on such lists to be assessed for taxes. The custodian testified that after diligent search the above tax-list of 1770 was the earliest that he was able to find. And in this connection the defendants also put in evidence a list of the polls and estates, real and personal, of the proprietors and inhabitants of the town of Smithfield, called an estimate for taxation for the year 1778, by which it appeared that Stephen Jenks, senior, was listed for 32 acres, designated as wood and waste land, and was also listed for other land, namely, two acres of tillage land and ten acres of pasture land. This estimate list was the only one of the kind found or offered in evidence covering any period anterior to the death of Stephen Jenks, senior. It was also in evidence that this Stephen Jenks, from 1768 until his death in 1800,

was the owner of land in Smithfield, adjoining the land in dispute, and that the land conveyed in and by said deed of Stephen Jenks, junior, to his brother, Jerahmael Jenks, in 1804, consisted of about 32 acres, which appeared in the partition thereof among the heirs-at-law of the latter to be wood land, and there was no evidence tending to show that Stephen Jenks, senior, ever owned any wood or waste land in Smithfield other than the 32 acres listed to him as aforesaid; and there was no evidence that the land in dispute was assessed to any other person, or that any one of the Fuller family was ever assessed for or ever paid any tax upon the same; and it was in proof and it was admitted by the plaintiff that from 1805 to the time of trial the taxes on the land had always been assessed to and paid by the defendants and those from whom they derived their title.

It appeared, from evidence submitted by the plaintiff, that Ezekiel Fuller, in his deed of the 11th of April, 1761, conveying the 20-acre lot delineated on the diagram hereinbefore annexed, recited that such lot was bounded on the north by his former land.

There was also evidence tending to prove that the defendants' ancestors in title had cut wood upon the land for their own family uses, more or less, every year from about the year 1829 down to the year 1857, when it was in proof that the father of the defendants, Capt. Nathaniel G. B. Dexter, from whom they derive their title, then cut and took to his own use all the wood of value then remaining on the lot; and there was also evidence from one witness, who testified that he cut wood on this land for Jerahmael Jenks, who died in June, 1821.

But there was also evidence tending to prove that the plaintiff's ancestors and privies in title, members of the Fuller family, between 1826 and 1858, and at varying intervals were in the habit, under claim of title in themselves to the land in dispute, of cutting wood thereon openly in the day time, and in sight of witnesses, for family uses and for the manufacture of baskets, in which business some of the Fullers were engaged, and of carting it off from the land to their houses, under such claim of title, openly through the village streets in the day time, and in the presence and sight of witnesses, sometimes with teams, sometimes in wheelbarrows and sometimes on their backs; and it was also in evidence that on three occasions, in contemplation of taking legal proceedings for establishing their title to said land, some of the Fullers went around and upon said land and pointed out the boundaries of this land, and claimed to own it to the parties who were intending to assist them in such contemplated proceedings, to wit, once in the year 1840, once in the year 1844, and once in the year 1856.

And against the objection and exception of the defendants, on the ground of irrelevancy, immateriality, and inadmissibility, the plaintiff was permitted to show in evidence that in the year 1835 the said Fullers, the plaintiff's ancestors in title, brought an action in the proper court against certain persons, with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼-acre lot delineated on the diagram hereinbefore set forth, and that the same was afterwards, in 1838, discontinued, on account of the

poverty and the pecuniary inability of the Fullers to carry it on. And the defendants objected to the admission of the copy of the proceedings in said action introduced by the plaintiff, on the ground that it was irrelevant, immaterial, and inadmissible under the issues, but the court ruled the same in, whereupon the defendants duly excepted. And the plaintiff was also permitted to put in evidence against the objection and exception of the defendants the testimony of witnesses that they had been informed that the suit described in said record was discontinued on account of the poverty and pecuniary inability of the plaintiffs to carry it on.

This testimony and the testimony offered by the plaintiff from a large number of witnesses as to the poverty of the plaintiff's *cestuis que trust*, and of those from whom the plaintiff derived title; also statements by members of the Fuller family, and of numerous other persons living in the vicinity of the property, whether connected with either of the parties to the case or not, and unconnected with any act upon the land itself, of the claims of the Fuller family to the land in question, and the general notoriety of the same, and the tradition of this claim in the Fuller family and their claims to other parts of said original 33⅓-acre tract were admitted by the court against the objections and exceptions of the defendants as bearing upon the question of the presumption of a lost grant.

But the only evidence tending to show, except general notoriety—but there was no evidence tending to show that the defendants had any knowledge of the notoriety of the Fuller claim, and in their evidence they deny any such knowledge, and the defendants also introduced several witnesses who denied any knowledge of the Fuller claim—any knowledge on the part of the defendants, or those from whom they derive title, of these acts of the plaintiff's ancestors in title was the following from the evidence of Daniel Pearce, examined by the plaintiff's counsel, Mr. Mowry:

"Q. Did you ever know of the Fullers cutting wood from this place? If so, how many times, and where?

"A. Never but once, and I only saw one of them there then. This was some twenty-odd years ago. I was living in my house on Central street at that time. It must have been nearly thirty years ago. I saw Benjamin Fuller, as I afterwards ascertained it to be. I was going to Valley Falls on what is now Broad street. I met Capt. Nathaniel G. B. Dexter just this side of this lot, and I spoke to him, and he said, I don't know what I shall do with these Fullers; he said they kept coming and carrying off his wood off this lot, and Capt. Dexter left me, and I proceeded on towards Valley Falls, and the man above I saw cutting wood had just come on to the road with a wheelbarrow-full of wood off this lot. I asked him, Benjamin Fuller, if he and Capt. Dexter had been having a duel up in the woods. He said no; he had been cutting wood off his own land, and that Capt. Dexter had sworn pretty hard at him, and that he had sworn as hard at him. I then passed along. He, Benjamin Fuller, was the only one of the Fullers

that I ever saw cutting wood on that side of the road, and that was the only time I ever saw him."

And the following evidence from Welcome A. Phillips, called by the plaintiff and examined by his counsel, Mr. Mowry, as follows:

(By Mr. Mowry:)

"Q. Did you ever have any conversation with Capt. Dexter with reference to the Fullers getting wood from this land?

A. I think once, and not more than once, to my knowledge.

Q. Well, state that.

A. Capt. Dexter, you all know, dealt in thread and yarn all those days and had a place up on Pleasant street—I think they call it—in Pawtucket; I used to go there frequently to get some yarn for my daughters when they were away from school to knit crochet and one thing and another. One time I remember I went down, and never but once caught the captain in. This time the captain was in. I got my orders and started to go out, and the captain then says to me, 'Mr. Phillips, do you see the Fullers on my land there lately?' Says I, 'Occasionally I see them on there.' He stopped a minute, the captain did, and looked in the fire and says: 'There I don't know what I shall do with those Fullers; I don't know what I shall do with them.' Says I, 'I will tell you what I would do if I was in your place. You have enough, captain, and to spare, and they are poor, old Uncle Ben in particular, and I never saw them carry off any wood there but brush wood to burn—wood that you wouldn't pay a man for carting off;' and I left the captain in that shape. He didn't make any answer to it whatever, and that is the only conversation that I ever remember of having with Captain Dexter himself."

The defendants excepted to certain instructions and refusals of instructions to the jury by the court as particularly shown in the bill of exceptions. [Record, 28-39.]

The jury returned a verdict for the plaintiff on which judgment was rendered. The defendants sued out this writ.

II.

Assignment of Errors.

The defendants assign for error that the court below erred,—

First—In permitting the plaintiff to show in evidence, against the objection and exception of the defendants, on the ground of irrelevancy, immateriality, and inadmissibility, that in the year 1835, the Fullers, the plaintiffs ancestors in title, brought an action in the proper court against certain persons, with whom the defendants were not in privity of title or ancestry, for the recovery of another portion of the 22¼-acre lot delineated on the diagram hereinbefore set forth, and that the same was afterwards, in 1838 discontinued, on account of the poverty and pecuniary inability of the Fullers to carry it on.

Second—In admitting in evidence against like objection and exception on like ground as recited in the first assignment of error, a copy of the proceedings in said action introduced by the plaintiff.

Third—In permitting the plaintiff to put in evidence against like objection and exception on like ground as recited in the first assignment of error the testimony of witnesses that they had been informed that the suit described in said record, was discontinued on account of the poverty and pecuniary inability of the plaintiffs to carry it on.

Fourth—In admitting against like objection and exception on like ground, as recited in the first assignment of error, the testimony offered by the plaintiff from a large number of witnesses, as to the poverty of the plaintiff's *cestuis que trust*, and of those from whom the plaintiff derived title.

Fifth—In admitting in evidence offered by the plaintiff against like objection and exception on like ground as recited in the first assignment of error, statements by members of the Fuller family, and of

numerous other persons living in the vicinity of the property, whether connected with either of the parties to the case or not, and unconnected with any act upon the land itself, of the claims of the Fuller family to the land in question, and the general notoriety of the same, and the tradition of this claim in the Fuller family and their claims to other parts of said original 33⅓-acre tract.

Sixth—In refusing to instruct the jury as specially requested by the defendants to do, that the presumption that they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possession, the charge actually given having been as follows, and which the court refused to modify:

"But, gentlemen, the defendants under this issue maintain that you have a right to presume an early grant from Ezekiel and Abigail Fuller, or from Abigail Fuller to Jeremiah Richardson, their ancestor's grantor. Of course gentlemen, if you find that you can presume a grant, if you find from the testimony that there was a lost deed, which passed from Abigail Fuller to Jeremiah Richardson or to Francis Richardson, and the property was inherited by Jeremiah, so that Jeremiah had a good title to convey to Stephen Jenks, that makes the title of the defendants here complete; and the plaintiffs, instead of having shown a legal title, have shown none, because, then, the legal title to the land in question would be in the defendants; and, gentlemen, this is the defence which they set up under the general issue. They say that you have a right to presume that there was a deed which passed from Abigail Fuller to Francis or Jeremiah Richardson.

Now gentlemen, that is a question of fact for you to determine. It is undoubtedly true that length of possession going back a great number of years, accompanied by other circumstances, might warrant a jury in presuming a grant or in presuming a lost deed. But, gentlemen, you are to look into the evidence upon that question of a grant, and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony. It is a question for you to determine upon the testimony. Now, gentleman, the defendants, with respect to this presumption of a grant or a lost deed, present to you a warranty deed which they received from Jeremiah Richardson. They claim that they have paid taxes on this property from 1770 down to the present date. They further maintain that according to the law with respect to the taxation of property the law from 1798 to 1825 was that the land should be taxed to the person who held or occupied it; that from 1825 down to 1855, according to the law, it was to be taxed to the persons who held or occupied it, or to the owners; that the persons who levied

the taxes, as officers, are presumed to have done their duty according to law, which is the case.

Now, gentlemen, they further say that the deed from Jeremiah Richardson to Stephen Jenks was a warranty deed; that they have paid the taxes during this length of time; that they have been in possession of this property for over a hundred years; and, gentlemen, they further say, going to show that there may have been an early deed, that the town council proceedings of the town of Smithfield is evidence going to show that at that time Abigail Fuller or her children had no other land in the town of Smithfield, except the lot in question, which was sold under the act of the General Assembly—the six-acre lot. Gentlemen, this is the evidence which the defendants introduce—part of it. I don't pretend to state the whole or in detail going to show you that you have a right to presume upon the testimony, that there was a grant from Abigail Fuller to either Francis or Jeremiah Richardson.

But, gentlemen, the plaintiffs, in order to rebut and overcome any such presumption, also bring forward certain considerations or facts. They claim, gentlemen, that in the deed which Francis Richardson made to Stephen Jenks the consideration, which they claim was small, shows that there was something improper about the deed. They also claim that what he recites in that deed that this property had come from his honored grandfather, or words to that effect, also shows that he had no deed, and that his brother had no deed from Abigail Fuller. They also claim, gentlemen, that these children were small at about this time in 1768, or previous to that time—the children of Abigail and Ezekiel Fuller—and that afterwards Abigail intermarried with Benjamin Fuller, and became a married woman, and engaged in bringing up a family from 1779 until 1832. They also claim, gentlemen, that the family was poor, and that in consequence they had not the means to prosecute their rights. They also maintain, gentlemen, that there always has been a tradition in the Fuller family as far back as you can go by any testimony that this land always did belong to Abigail Fuller, the daughter of Francis Richardson.

Well, gentlemen, these are some of the leading facts upon one side or upon the other, which you will weigh, and such other testimony bearing upon this question, either introduced upon the side of the plaintiffs or the defendants, upon this question of a grant or lost deed; and, gentlemen, you will determine upon that evidence whether there was an early deed from Abigail Fuller to either Francis or Jeremiah Richardson. * * Then you will consider the question of the presumption of a deed, and whether you can, under the circumstances, presume a deed or not upon the evidence as it is submitted. If you find that there was no lost deed then you will come to the statute of possessions, and you will determine, in the first place, when the possession of the character that I have described began."

Seventh—In refusing to instruct the jury, as specially requested by

the defendants to do, that under the statute of possessions of this State, which has been in force here since the year 1728, twenty years uninterrupted, quiet, peaceable, and actual seizin and possession of any land, for and during the said time claiming the same as his, her, or their proper, sole, and rightful estate in fee-simple, creates in the possessor a good and rightful title to the land so occupied, and if at the commencement of any such possession the person holding the title is under disability, such person can only avoid the title so acquired by the adverse occupant by suit commenced within ten years after the removal of the particular disability which existed at the time such possession commenced, the charge actually given having been as follows, and which the court refused to modify:

"Gentlemen, if you find that the legal estate in this property is in these complainants, if you find that Abigail Fuller, or her husband in her right, entered into possession of the property under the will of Francis Richardson, and if you find that there was no grant from Abigail Fuller to Jeremiah Richardson, or the person from whom he obtained his title, then you will come to the statute of possessions. Of course, gentlemen, if you find that there was an early deed from Abigail Fuller that is an end of the plaintiff's case. If you find that neither Abigail Fuller nor her husband entered into possession under the devise, then Abigail Fuller couldn't give what she didn't obtain, and that would be an end to the plaintiff's case. Also, if you should find that the land in question here was not the land included in the land deeded from James Reed to Francis Richardson of course that would be an end to the plaintiff's case. But if you find that the land in question here was part of the land which belonged to Francis Richardson, if you find that Ezekiel Fuller or Abigail Fuller did enter into possession under the devise of Francis Richardson, if you find that there was no early deed, or that you cannot presume a grant, then, gentlemen, you will come to the consideration of the statute of possessions. This is the second defence which the defendants offered here; and, gentlemen, I will read to you two sections of the statute of possessions of the State of Rhode Island." (Reads sections 2 & 3 of chapter 175 of the Public Statutes of Rhode Island.)

"Gentlemen, you see there what the statute of possessions in this State is, and it was substantially the same, as is admitted by both sides, during the period covered by this case—that is, gentlemen, under the statute of possessions of Rhode Island a party who enters into the uninterrupted, quiet, peaceable, and actual seizin and possession of lands, claiming the same as their proper, sole, and rightful estate in fee-simple for a period of twenty years, acquired an absolute title to the estate.

There are two exceptions, gentlemen, to this general rule. These exceptions apply to two classes of individuals. The first exception relates to married women, to infants, to persons of unsound mind, and to those beyond the sea, &c. The second class refers to remainder-men

or reversioners; that is, if I have an estate in remainder—if there is a life estate ahead of me before I am entitled to the possession of the property, then possession doesn't run against me—only in a certain degree, at least until ten years after the termination of the life estate. And so with the other class of disabilities. That is, gentlemen, the law is this, twenty years' uninterrupted, quiet, and peaceable and actual seizin and possession, claiming the same, gives a good title to land. There are two classes of exceptions—two provisos—namely, infants and married women, persons of unsound mind and others, and, lastly, remaindermen and reversioners, and these two classes of persons under disabilities have ten years after the termination of the disability within which to prosecute their right of action.

The counsel for the defendants in this case has requested me to charge you that under the law of Rhode Island a person under disability, especially under the disability of coverture, or others of that class, must bring suit for the possession. But, gentlemen, I shall charge you that the law is that they may enter upon the land and take possession by making a legal claim, as well as by bringing suit. So that, gentlemen, we come down to this, that when persons are under the disability of marriage, or under the disability of a life estate ahead of them, that they have ten years after the disability ceases within which to claim a right to the land, either by entry or by bringing suit.

But, gentlemen, you will bear with me a few minutes longer on this question of the statute of possession, for it is a somewhat complicated question to understand in all its bearings upon the case before us. The statute gives a married woman or a person entitled to estate in remainder ten years after the termination of that disability within which to bring their right of action.

Now, gentlemen, a person under disability is entitled to but one disability under each class. For example, if Abigail Fuller, at the time these parties entered into possession of this land, was an infant, she would have, of course, ten years after the termination of that infancy. If she was an infant until 1778 she would have ten years after the termination of that infancy within which to assert her rights, provided, of course, the defendants had been in the uninterrupted, quiet, and peaceable possession for twenty years; but, gentlemen, if she had the benefit of that disability of infancy, and afterwards was married, she couldn't have the benefit of both of those disabilities. She could have simply the benefit of the disability of infancy, which was a disability existing at the time the possession began; but if after the possession began she was married then she couldn't also have the benefit of coverture. But, gentlemen, if at the time the possession began she was under coverture then, of course, she would have the benefit of that disability of coverture. She has the benefit of one disability, and you can't tack one disability upon another, or add to it. Of course, if she had a life estate in her father she would have the benefit, also, of ten years after the death of the life tenant. She would have the benefit of that, and she would have the benefit also of the disability of infancy or of coverture under that particular exception.

And, gentlemen, there is another peculiarity of the statute, and that is, if it begins to run it never ceases. Now, we will suppose that at the time that Abigail Fuller was *femme-sole*, for instance, that is, at the time that Abigail Fuller was a single woman and of full age—twenty-one years of age—that at that time the parties entered into possession of the premises; then a suit having begun to run it would not cease running by reason of her subsequent coverture, although of course, then, gentlemen, she would be entitled to the benefit of remainder within ten years after the life estate. So it is important for you, right at the starting point of this case, with respect to the statute of disabilities, to determine when the possession of these defendants began.

When did their adverse possession begin? I will explain to you presently what adverse possession is. But first when did it begin?

If, gentlemen, the adverse possession began before the coverture of Abigail Fuller in 1779, what would be the situation? She would have been an infant up to 1778, at least, and would have been only entitled to the disability of infancy, and her right would cease ten years after the disability of infancy ceased. She would not be entitled to any disability of coverture, because she would have the benefit of the disability of infancy, and that would be all, if you find that the defendants entered into possession between 1778 and 1779 and remained in possession, of course, for twenty years—uninterrupted, quiet, and peaceable and actual possession; but she would only have the benefit of the disability of infancy added to, of course, the benefit of the disability under the other section as to remainder—that is, if her father, having the life estate, died in 1800 she would have a right until 1810 to sue or to make entry.

Therefore, gentlemen, it is all important for you to consider, under this second division of this case, when these defendants entered into the adverse possession of the property, and did they enter into the adverse possession previous to the coverture of Abigail Fuller, in 1779. Of course, gentlemen, if Abigail Fuller had brothers or a sister, the same rule with respect to the disability which I have been explaining would apply to them also. Therefore I say it is all important for you to consider when the possession of these defendants began, especially with reference to the coverture of Abigail Fuller in 1779."

Eighth—In refusing to instruct the jury, as specially requested by the defendants to do, that uninterrupted payment by the defendants and those under whom they claim of the taxes upon the land in question since 1805, as admitted by the plaintiff, is powerful evidence of the defendants' claim of right to the land.

Ninth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that Stephen Jenks paid the

taxes upon the land in question from the year 1770 until his death, it is powerful evidence of his claim of right to the land.

Tenth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that the land in question has never been assessed to any of the Fuller family since 1768, and that no one of them has ever paid taxes upon it, it is evidence that they had no rightful claim to it, which the jury have the right to consider.

Eleventh—In refusing to instrnct the jury, as specially requested by the defendants to do, that by the laws of the State from the year 1798 to the year 1825, the assessors of taxes of the several towns were required to assess the taxes upon real estate to the person who held or occupied the same, and that from 1825 to 1855, to assess either upon the person who held and occupied the lands or upon the owners thereof, and from 1855 to the present time upon the owners; and the presumption is that the assessors performed their duty; that the fact that the taxes since 1805, as admitted by the plaintiff, have been assessed to and paid by the defendants, and those under whom they claim is evidence of possession and ownership during that time by the defendants and those under whom they claim which the jury are entitled to consider, the charge actually given having been as follows, and which the court refused to modify:

"They (the defendants) claim that they have paid taxes on this property from 1770 down to the present date. They further maintain that, according to the law with respect to the taxation of property, the law from 1798 to 1825 was that the land should be taxed to the person who held or occupied it; that from 1825 down to 1855, according to the law, it was to be taxed to the persons who held or occupied it, or to the owners; that the persons who levied the taxes as officers are presumed to have done their duty according to law, which is the case."

This portion of the charge was given only when instructing the jury upon the question of the presumption of a lost grant, as stated above under the sixth error assigned. In the subsequent portion of the charge upon the question of possession the instruction was as follows: "Now, gentlemen, it is true that the giving of a deed doesn't show possession; that the payment of taxes does not prove possession. The giving of a deed from Jeremiah Richardson to Stephen Jenks doesn't show that they entered into possession, doesn't prove it under that deed—*i. e.*, such adverse possession as the statute calls for—nor does the payment of taxes show it.

In order to constitute, gentlemen, an adverse possession there must be an actual entry upon the land, cultivation of the land, or a building upon

the land, or a fencing of the land, and such other notorious or continuous acts of ownership, which go to prove that the party claims to be the owner, and that the possession is of such a character as the land is capable of. Gentlemen, I will repeat that, in order to show adverse possession, the parties in this case must show that they entered upon the land, and that they occupied it, or improved it, or fenced it, or built upon it, or they must show possession by such other notorious, open, continuous acts of possession as the character of the property calls for."

Twelfth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that the defendants and those from whom they derive their title to the land in question, have for any twenty years after the death of Benjamin Fuller, in 1832, and prior to the commencement of this suit, been in the uninterrupted, quiet, peaceable, and actual seizin and possession of the lands in question, for and during such twenty years, claiming the same as their sole and rightful estate in fee-simple [they thereby acquired a good and rightful title and estate] in the lands which could be only avoided by actual possession by the plaintiff or those under whom he claims for a subsequent term of twenty years, and there being no evidence or claim on his part of any such subsequent possession, the defendants would be entitled to a verdict.

Thirteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that the defendants and those from whom they derive their title to the land in question have for any twenty years prior to the death of Benjamin Fuller, in 1832, been in the uninterrupted, quiet, peaceable, and actual seizin and possession of the land for and during any such twenty years, claiming the same as his, her, or their property, sole and rightful estate in fee-simple, they thereby acquired a good and rightful title to the land, which could be avoided only by suit brought within ten years after the death of Benjamin Fuller by Mrs. Fuller, grandmother of the plaintiff, or those claiming under her, and the defendants would therefore be entitled to a verdict.

Fourteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find such possession by those from whom the defendants derive their title commenced prior to the marriage of Abigail Fuller, grandmother of the plaintiff, and continued for twenty years, they, during that time, claiming the land as their proper, sole, and rightful estate in fee-simple, and also find that her father, Ezekiel Fuller, had a life estate in the lands as tenant by the

curtesy, the defendants' ancestors in title thereby acquired a good and rightful title to the land, which could be only avoided by suit by Mrs. Fuller, grandmother of the plaintiff, within ten years after the death of her father, Ezekiel Fuller, and the defendants will then be entitled to a verdict, the charge actually given having been as cited under the seventh error assigned, and which the court refused to modify.

Fifteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that to interrupt possession under a claim of title in fee-simple under the statute of possessions of this State, and to prevent such possession from ripening into title at the end of twenty years, there must be such acts upon the land itself within such twenty years as practically to interfere with the actual possession and enjoyment of the land by the occupant, the charge actually given having been as follows, and which the court refused to modify:

"Now gentlemen, what is possession—such adverse possession as would give these defendants a good title after they had been in such possession for twenty years?

The statute says 'uninterrupted, quiet, peaceable, actual seizin and possession.' You must, therefore, determine upon the evidence whether between 1768 and 1779 the defendants have shown by the testimony that they were in the uninterrupted, quiet, and actual seizin and possession of this property under a claim of right to own the property in fee-simple.

Now, gentlemen, it is true that the giving of a deed doesn't show possession; that the payment of taxes does not prove possession. The giving of a deed from Jeremiah Richardson to Stephen Jenks, doesn't show that they entered into possession; doesn't prove it under that deed—that is, such adverse possession as the statute calls for—nor does the payment of taxes show it. In order to constitute, gentlemen, an adverse possession there must be an actual entry upon the land, cultivation of the land, or a building upon the land, or a fencing of the land, and such other notorious or continuous acts of ownership which go to prove that the party claim to be the owner, and that the possession is of such a character as the land is capable of. Gentlemen, I will repeat that, in order to show adverse possession, the parties in this case must show that they entered upon the land, and that they occupied it, or improved it, or fenced it, or built upon it, or they must show possession by such other notorious, open, continuous acts of possession as the character of the property calls for.

Now, gentlemen, in determining whether these defendants had possession between 1768 and 1779, you will determine upon the evidence presented whether they had such possession as I have described. If you find, gentlemen, upon the testimony that they had such possession, then the right of Abigail Fuller would cease, at the latest, in 1810, and therefore, if you should find that she made no entry or brought no suit

prior to 1810 that would bar the plaintiffs. If, gentlemen, you find upon the testimony that no such possession as I have described was made by the defendants prior to 1779, then the coverture of Abigail Fuller would protect her until 1832—that is, if the defendants had made such a possession as I have described after 1779 at that time, Abigail Fuller, being under the disability of coverture, would be protected until 1832, and she would have ten years after 1832 within which to assert her rights; and, gentlemen, if you should find upon the testimony that between 1832 and 1842, provided, of course, you find that Benjamin Fuller died at that time, and that she became a widow then; if, between 1832 and 1842, legal entries were made upon this land by the heirs of Abigail Fuller, or by herself, or by one of the heirs as representing the rest then that would stop the running of the statute for the period of twenty years; and if you find that entries were made during the first ten years, legal entries—and I will explain what a legal entry is presently—if you find that a legal entry was made between 1832 and 1842, and that there were subsequent legal entries made upon the land down to within a period of twenty years from the beginning of this suit, that would preserve the rights of these plaintiffs until the time of the bringing of this suit.

And if you find that in 1874 Theodore Fuller under a power of attorney went upon the land and delivered a deed to Nathan Fuller with a clod of earth that would be sufficient to keep the title in Nathan Fuller and those whom he represents. Therefore, gentlemen, if you should find that there was a possession such as I have described prior to 1779 by the defendants, Abigail Fuller's right would expire in 1810. If you find that there was no such possession previous to that date, then whatever possession there may have been after 1779 down to 1832 *still* Abigail Fuller's right would not expire until ten years after 1832; and if you should find that within that ten years entries were made and at subsequent periods of twenty years down to the beginning of this suit that would keep alive the right of these plaintiffs.

Now, gentlemen, what is a legal entry, a legal entry by a person who has been disseized or put out of possession of property to which he was originally legally entitled or who has a record title; that is, what would constitute a legal entry of the Fullers in this case on the hypothesis that they had the legal title, a title which originally came to them from Abigail Fuller; what would constitute a legal entry after 1832? Well, gentlemen, a legal entry would be where the rightful party goes upon the land visibly, openly, under a claim of right, and exercises acts of ownership upon the land, such as cutting wood, &c.

And, gentlemen, right here let me say, upon the subject of possession and the right of these plaintiffs here, that you will not consider at all the poverty of the Fuller family. Whether they were poor or rich has nothing to do with their asserting in a proper manner, either by suit or otherwise, their right to the possession of the property. Neither, gentlemen, have the claims which the Fullers have made generally in the community to this property any bearing upon the question of whether they made a legal entry on to this property after 1832. Such

declarations, gentlemen, as they made at the time that the acts were committed, or about the time that the acts were committed, such declarations as they made going to show the intent with which they entered, are admissible, but the general claim in the community or the general poverty of the Fuller family should in your minds have no bearing at all upon the question of the assertion of their rights under the statute of possession or of limitations only in this view—that the expressions that they made at the time the acts of interruption were committed, or about the time that they were committed, are admissible as going to show the intent with which it was done and their claim to the property.

Therefore, gentlemen, after 1832, you will consider upon the evidence submitted whether Abigail Fuller or the heirs of Abigail Fuller, or any one of them, made a legal entry upon these premises, and whether, if they made a legal entry within ten years, they continued to make other entries within a period of twenty years, down to the beginning of this suit. And you will remember that it must be an open visible entry, under a claim of ownership; not a secret entry, not going on there occasionally to get a little wood, and not with the intent of claiming, but going upon the land under a claim of ownership, and getting wood and carrying it off."

Sixteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that mere claims of ownership or title off the land itself, and not accompanying any act upon the land, are not evidence of interruption of the possession, and the jury will not be justified in so considering, the charge actually given having been as cited above under the fifteenth error assigned, and which the court refused to modify.

Seventeenth—In refusing to instruct the jury, as specially requested by the defendants to do, that no such claims of right or title to the land, made after 1825, are any evidence whatever to rebut the presumption of a lost deed prior to 1768.

Eighteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that merely occasionally going upon the land in the absence of the party in the actual possession and enjoyment of it, and cutting wood of little value, if unaccompanied by any actual disturbance of the enjoyment of the land by the occupant for all practical purposes, will not, under the statute, work any interruption of the occupants' possession to stay the running of the statute, the charge actually given having been as quoted above under the fifteenth error assigned, and which the court refused to modify.

Nineteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that, so far from claims of right or title made off the land and not accompanying any act upon the land being evidence of interruption of possession, they may be considered by the jury as evidence of such possession by the defendants and those from whom they derive their title, as they tend to show knowledge and recognition by the plaintiff and those under whom he claims that the lands were actually held in possession by somebody else adversely to them.

Twentieth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that at the time the deed to the plaintiff of May 24th, 1874, was made, the defendants were in the actual possession of the land, claiming the same as their own in fee-simple, the deed was ineffectual as against the defendants to convey to the plaintiff any title to the land under the circumstances attending its delivery disclosed by the evidence, the charge actually given having been as follows, and which the court refused to modify:

"And if you find that in 1874 Theodore Fuller under a power of attorney went upon the land and delivered a deed to Nathan Fuller with a clod of earth, that would be sufficient to put the title in Nathan Fuller and those whom he represents."

Twenty-first—In refusing to instruct the jury, as specially requested by the defendants to do, that by the law of this State the conveyances by a party of land of which he is disseized passes no title as against the disseizor, and merely going upon the land and there passing the deed to the grantee with a handful of dirt taken from the land without the knowledge of the party in possession, and without actually disturbing his possession and enjoyment of the land, is not sufficient to give effect to the deed as against the party in possession.

Twenty-second—In refusing to instruct the jury, as specially requested by the defendants to do, that public officers are presumed to have done their full duty, particularly in transactions that occurred over a hundred years ago. The jury are therefore entitled to consider whether the town committee, who in and about the years 1761 and 1762 were searching for Fuller lands from which to support the children, would not have found and reported the land in question as a part of the estate to be sold for the support of the children of Ezekiel Fuller or [if] his children claiming under his deceased wife—had then any rightful estate in it, which instruction the court refused to give except as contained in that part of charge cited above under the seventh error assigned.

declarations, gentlemen, as they made at the time that the acts were committed, or about the time that the acts were committed, such declarations as they made going to show the intent with which they entered, are admissible, but the general claim in the community or the general poverty of the Fuller family should in your minds have no bearing at all upon the question of the assertion of their rights under the statute of possession or of limitations only in this view—that the expressions that they made at the time the acts of interruption were committed, or about the time that they were committed, are admissible as going to show the intent with which it was done and their claim to the property.

Therefore, gentlemen, after 1832, you will consider upon the evidence submitted whether Abigail Fuller or the heirs of Abigail Fuller, or any one of them, made a legal entry upon these premises, and whether, if they made a legal entry within ten years, they continued to make other entries within a period of twenty years, down to the beginning of this suit. And you will remember that it must be an open visible entry, under a claim of ownership; not a secret entry, not going on there occasionally to get a little wood, and not with the intent of claiming, but going upon the land under a claim of ownership, and getting wood and carrying it off."

Sixteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that mere claims of ownership or title off the land itself, and not accompanying any act upon the land, are not evidence of interruption of the possession, and the jury will not be justified in so considering, the charge actually given having been as cited above under the fifteenth error assigned, and which the court refused to modify.

Seventeenth—In refusing to instruct the jury, as specially requested by the defendants to do, that no such claims of right or title to the land, made after 1825, are any evidence whatever to rebut the presumption of a lost deed prior to 1768.

Eighteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that merely occasionally going upon the land in the absence of the party in the actual possession and enjoyment of it, and cutting wood of little value, if unaccompanied by any actual disturbance of the enjoyment of the land by the occupant for all practical purposes, will not, under the statute, work any interruption of the occupants' possession to stay the running of the statute, the charge actually given having been as quoted above under the fifteenth error assigned, and which the court refused to modify.

Nineteenth—In refusing to instruct the jury, as specially requested by the defendants to do, that, so far from claims of right or title made off the land and not accompanying any act upon the land being evidence of interruption of possession, they may be considered by the jury as evidence of such possession by the defendants and those from whom they derive their title, as they tend to show knowledge and recognition by the plaintiff and those under whom he claims that the lands were actually held in possession by somebody else adversely to them.

Twentieth—In refusing to instruct the jury, as specially requested by the defendants to do, that if the jury find that at the time the deed to the plaintiff of May 24th, 1874, was made, the defendants were in the actual possession of the land, claiming the same as their own in fee-simple, the deed was ineffectual as against the defendants to convey to the plaintiff any title to the land under the circumstances attending its delivery disclosed by the evidence, the charge actually given having been as follows, and which the court refused to modify:

"And if you find that in 1874 Theodore Fuller under a power of attorney went upon the land and delivered a deed to Nathan Fuller with a clod of earth, that would be sufficient to put the title in Nathan Fuller and those whom he represents."

Twenty-first—In refusing to instruct the jury, as specially requested by the defendants to do, that by the law of this State the conveyances by a party of land of which he is disseized passes no title as against the disseizor, and merely going upon the land and there passing the deed to the grantee with a handful of dirt taken from the land without the knowledge of the party in possession, and without actually disturbing his possession and enjoyment of the land, is not sufficient to give effect to the deed as against the party in possession.

Twenty-second—In refusing to instruct the jury, as specially requested by the defendants to do, that public officers are presumed to have done their full duty, particularly in transactions that occurred over a hundred years ago. The jury are therefore entitled to consider whether the town committee, who in and about the years 1761 and 1762 were searching for Fuller lands from which to support the children, would not have found and reported the land in question as a part of the estate to be sold for the support of the children of Ezekiel Fuller or [if] his children claiming under his deceased wife—had then any rightful estate in it, which instruction the court refused to give except as contained in that part of charge cited above under the seventh error assigned.

Twenty-third—In refusing to instruct the jury, as specially requested by the defendants to do, that all acts are presumed to have been rightfully and regularly done, and this applies particularly to transactions of ancient date, and applies to deeds made so many years ago that no living testimony can be adduced respecting them, and the jury may presume that the deed was rightfully made and the possession was rightfully taken and held under it, particularly if they find that the subsequent possession and dealings with the land within the time —capable of existing proof and the payment of taxes upon the land had been consistent with the deed.

Twenty-fourth—In refusing to instruct the jury, as specially requested by the defendants to do, that under the statute of James First, limiting real actions, the right of action of Mrs. Abigail Fuller, Jr., or of her heirs, was barred twenty years, at the latest, from the time when that right of action first accrued, and that cannot be kept open by successive entries. In other words, if the right of action began in 1832, and the jury should find that she or her heirs did enter after 1832, prior to 1842, the right of action would be barred, at the latest, at the end of twenty years from that latter time by the statute of James.

III.

Argument.

We may consider the first five assignments of error together.

The evidence here objected to was all admitted, "*as bearing upon the question of the presumption of a lost grant.*" [Record, 27.] It was not claimed to be admitted or to be admissible upon any other ground. And it is submitted, that its admission was manifest error: For how by possibility can it be claimed that transactions in and after 1835 between parties utter strangers to the defendants and their ancestors in title—much less vague statements at that late date, not only by the Fuller family, but even by utter strangers also, and not brought to the defendants' knowledge—can have any bearing whatever upon the question of the presumption of a lost grant between January 1756 and June 1761. The bare statement of the proposition is its own sufficient refutation; for the rules of evidence applicable to this question are the same as to other matters. And it was not pretended that these transactions and statements were any part of any *res gestæ* relating to the land in controversy, nor even to any matter to which the defendants or their ancestors in title were in any manner privy.

1 Greenleaf on Evidence, §. 108.
Stephen's Digest Evidence, (Chase Ed.), 6.
Lehigh &c. R. R. Co., vs. *McFarlane*, 43 N. J. Law, 605. (621-630.)

Sixth Assignment of Error.

Our complaint of this portion of the charge is, that it in effect instructed the jury that in order to presume the lost grant, they must be satisfied upon the evidence, that such grant had in fact once actually existed. But this, we submit, is far from being a correct statement of the law. Upon the case made, it is by no means clear that the defendants might not have asked the court to directly advise the jury to presume this grant; but certainly they were entitled to the qualified instruction which they did ask, or at least to some modification of the charge given, to bring it within the doctrine of the adjudged cases, which is, we submit, that in order to presume the grant, it need not be proved that it did in fact ever actually exist, nor is it necessary even for the jury to believe that it did in fact ever exist, but it is enough that such circumstances be proved as to show that it may have existed and is requisite to quiet the title in the possession.

As said by SIR WILLIAM GRANT, in *Hillary* vs. *Waller*, 12 Vesey, *252, "Presumptions do not always proceed on a belief, that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, merely for the purpose, and from a principle, of quieting the possession."

So, in *Casey's Lessee* vs. *Inloes*, 1 Gill (Md.), 503:

"We approve of the county courts refusal of the *eighth* prayer, 'that before the jury can find a title in the defendants, or any one of them, by presumption of a grant from the plaintiff, or those under whom she claims, they must believe in their conscience, and find as a fact, that such grant was actually made.' The granting of such a prayer would have had a tendency to mislead the jury, by inducing them to believe that the presumption of a grant could not be made, unless the jury in point of fact, believed in the execution of the grant; whereas, it is frequently the duty of the jury to find such presumption, as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant."

So, SWIFT, CH. J., in *Sumner* vs. *Child*, 2 Conn., 622:

"Any fact may be found by a jury on presumptive evidence; but, generally, facts are found on the ground that the jury are persuaded or convinced by the presumptive evidence, that they actually existed. All the innovation that has been made by courts in modern times, is, that they will permit a jury to presume a grant, charter, or any writing, though there is no probability that they ever existed. Lord *Mansfield* says—'Not that the court really thinks a grant has been made; because it is not probable that a grant should have existed without its being on record; but they presume the fact for the purpose, and from a principle of quieting the possession.'"

So, in *Williams* vs. *Donell*, 2 Head (Tenn.) 695, (697-698).

"It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish a probability of the fact, that in reality, a grant ever issued. It will afford a sufficient ground for the presumption, to show, that, by legal possibility a grant might have issued. And this appearing, it may be assumed—in the absence of circumstances repelling such conclusions—that all that might lawfully have been done to perfect the legal title, was in fact done, and in the form prescribed by law."

See also *Coolidge* vs. *Learned*, 8 Pick. 504.
Deeble vs. *Lineham*, 12 Ir. Com. Law, 1.

In answer to this, it may be suggested by the plaintiff, as it has heretofore been suggested, that this presumption can not be made against Abigail Fuller, senior, inasmuch as she was then under coverture. But there is no foundation in law for any such distinction. By the

common law of Rhode Island, as of other parts of New England, a married woman with her husband could convey her estate like any other person. And prior to 1798, no separate acknowledgement even by her was required.

Durant vs. *Ritchie*, 4 Mason, 45 (55-57).
2 Washb. on R. Property, *559-560.

And it is well settled, that a grant may be as well presumed from a married woman capable of conveying her estate as from any other person.
HOSMER, J. in *Bunce* vs. *Wolcott*, 2 Conn. 38.

Seventh Assignment of Error.

The defendants were entitled to the instructions here asked.

It cannot be doubted that but for the proviso of the statute, twenty years uninterrupted possession claiming title, would vest an absolute estate in the occupant against all persons even though under disability.

BRAYTON, J., in *Clarke* vs. *Cross*, 2 R. I. 442.
See also *Beckford* vs. *Wade*, 17 Vesey, 87.

As said by the Court, in *Union Savings Bank* vs. *Taber*, 13 R. I. 692: "The statute of this State is peculiar. It differs essentially from the statue of 21 James I. cap. 16, and the statutes of other States, which operate merely as a limitation on the right of entry or action, in that it transfers the title or estate itself, *proprio vigore*, whenever the conditions under which it takes effect have been completely fulfilled."

See also *Mowry* vs. *Providence*, 10 R. I. 52 (58).

For one therefore to be protected by the proviso of the statute, he must bring himself strictly within it.

United States vs. *Dickson*, 15 Pet. 141 (165).
Mowry vs. *Providence*, 10 R. I. 52 (58).
Beckford vs. *Wade* 17 Vesey, 87.
Sedgwick on Stat. and Cons. Law, 321, 322.

As said by BRAYTON, J., in *Clarke* vs. *Cross*, 2 R. I. 444-5: "It was not intended that the party in order to avoid the bar should have twenty full years free from all impediments, for if he be under impediments for the first ten years and it then be removed, he is barred by the twenty years, *unless he sue within the last ten years in which he is free.*"

In other words, the English doctrine of interruption of continuity of possession by mere entry, available under the statute of James I., and other like statutes, has no application under the statute of Rhode Island.

As said in *Union Bank* vs. *Taber*, (694-5-6), "The General Assembly was free to enact a mere statute of limitations if satisfied with it. The statute of 21 James I. cap. 16, which is the great prototype of such statutes, preceded our statute of possessions, by nearly a century. The differences between the two statutes were, therefore, undoubtedly not without a design, and not without a design, too, which would be thwarted if the two statutes were assimilated by construction. Ours was meant to be the more stringent, summary and absolute in its operation. The preamble shows it. According to the preamble, the statute was passed to prevent 'great contests in law,' which were imminent, because 'at the first settling of this State, and for sundry years afterwards, lands were of little or no value, and skilful men in the law were much wanted, whereby many deeds, grants, and conveyances were weakly made.' It was therefore a prominent purpose to make time the healer of precisely such defects as are the cause of the difficulty here, namely, defects of conveyancing. It is the duty of the court to promote rather than defeat this purpose. The statute is neither to be weakened by implication nor attenuated by borrowed glosses. Its strong and aggressive words are to be as strongly and aggressively interpreted; and in this view, possession must be taken to be adverse, in the only sense in which it need be adverse under the statute when it fulfils the express requirements of the statute; for then the possessor holds under a claim of right which is in derogation of all other rights and therefore adverse to them. He holds and asserts his possession against the world. The question, then, in a controversy like this, is not so much when did the right of action first accrue as when did the party in possession begin to claim to be the sole and rightful owner in fee simple, making his claim in such manner as to carry a knowledge of it, either actually or presumably, home to the mind of the true owners; for the latter and not the former date is the date at which possession begins to ripen into title; and if it be asked how, if the statute be so construed, a reversioner or remainder-man is protected, the answer is, that he is protected by one of the provisos, by a proviso which, if the construction for which the defendant contends were conceded without limitation, would be utterly meaningless and inexplicable. Under that proviso the reversioner or remainder-man has ten years, after the particular estate determines, within which to pursue his title; and therefore under the statute, as qualified by the proviso, the possession, though it begins to run during the particular estate, can never run during the particular estate more than half way to its consummation, thus leaving to the reversioner or remainder-man at least ten years, after his right accrues, within which to bring his action. The General Assembly undoubtedly deemed this a sufficient protection."

And this is no new doctrine. A strict analogy is found in the familiar principle of the common law, that in cases of ouster by discontinuance or deforcement, the owner could not enforce his right by entry, but only by action. For, as Blackstone says, "the original entry being lawful and thereby an apparent right of possession being gained, the

law will not suffer that right to be overthrown by the mere act or entry of the claimant;"—"the owner cannot enter but is driven to his action"—and such apparent right of possession "continues in force till a better right is shown *and recognized by a legal determination.*" So here, a party having acquired under the body of the Statute an absolute title as against all the world, except those only who could show a better right under paramount title saved by the provisos, thus acquires as against them also such apparent right of possession as can be defeated and ousted by the express terms of the provisos only in like manner by a judicial investigation, timely begun, that there may then be a final and conclusive determination of the right. On any other construction, the very purpose of the Statute is defeated; and instead of a Statute of repose, the title is kept in abeyance under a kind of "*continual claim.*"

Eighth, Ninth, and Tenth Assignments of Error.

The defendants were entitled to the instructions here asked. The first two of these were couched in the language of this Court in *Ewing* vs. *Burnett*, 11 Pet. 41, (54), to which the case at bar in many of its features is closely analogous, and in which it is said, "the uninterrupted payment of taxes on the lot for twenty-four successive years is powerful evidence of claim of right to the whole lot." And this was a vital issue in the defendants' case. As we have seen the statute of possession of Rhode Island is peculiar. It requires by its terms, and as expounded by the Supreme Court of the State in *Union Savings Bank* vs. *Taber*, *supra*, not only twenty years actual seizin and possession, but such possession for and during that time *claiming* the estate in fee simple—something more than might be sufficient evidence of claim under the usual statute of limitations—for as the State Court says in the above case, it is from the time of the commencement of such claim that "the possession begins to ripen into title."

It was not enough that the defendants showed themselves and their ancestors in title in long continued possession of the land, but they must also show their continuous claim of title to it. And evidence, therefore, like this continuous payment of taxes upon the land for upwards of a century was most material to the defendants' case. It was strong—powerful evidence of their claim of title to the land.

In *Sailor* vs. *Hertzogg*, 10 Pa., 316-317, it is said:

"In view of this connected series of facts, the jury was told that, although 'the assessment of a vacant lot or piece of ground, in the name of a particular individual without title, and even the payment of taxes

by him, is not of itself, evidence of such actual adverse possession in the party, as will enable him to set up the statute of limitations; yet, when there is a title, though it may be an imperfect and impeachable one, and proof of actual possession of the premises, for a portion of the time requisite to create a right, by those in whose names the property has been assessed for a number of years, the jury may look to such assessments as affording evidence, and, in many cases, strong, if not entirely satisfactory evidence, of a continuous possession, and of the claim made by such persons.' In this instruction it is not perceived a mistake was committed."

* * * * * * *

"If this be so in the case of uncultivated lands in a secluded district, surely, when the subject of the statute is a habitable structure, in the heart of a populous city, an assessment for forty years, consistent with a written title and an almost uninterupted actual possession, may be referred to as powerful proof of continuing possession during a doubtful period, or to assist in determining the relations of a stranger, who appears on the scene as temporary occupant; and as generally corroborative of the whole case. In truth such assessments may without breach of legal propriety be received as in some sort an official ascertainment of actual occupants and owners, by officers appointed for the very purpose. That it was so regarded by this court, when the case was here for the first time, is pretty evident from the laboriously prepared opinion then delivered:—4 Wh. 279."

In *Farrar* vs. *Fessenden*, 39 N. H., 277:

"In *Little* vs. *Downing*, 37 N. H. 355, it was holden that taxation of land for a long series of years to an individual, and his payment of those taxes, were competent evidence of his assent to and approval of the assessment of such land to him in severalty as the owner thereof—in other words, of his ownership thereof. On the same principle the taxation of the premises in controversy to the various persons claiming title thereto under John Durant, for a long series of years, and the payment of those taxes by them, or by one of them under whom the defendant claimed, was competent evidence, tending to show ownership, or at least a claim of ownership, which was the material point in the present case, in those persons."

In *Webb* vs. *Richardson*, 42 Vt., 474:

"The payment of taxes on real estate is not an act of possession, but is always regarded as admissible in favor of the party paying, as tending to show that he claimed the premises. It is the act of the party himself, and is in the nature of a declaration, on his part, that he claims the premises; yet it was never supposed that in order to enable the party to have the benefit of such proof for that purpose, in his own

favor, that the payment of the taxes should be made while actually on the land."

In *Paine* vs. *Hutchins*, 49 Vt., 317:

"The plaintiffs evidence tended to show that they had surveyed some of the outside lines of these lots in surveying the outside lines of the gore, and perhaps some other lines of them in running out lots, and that they had paid taxes on them; but did not show that they had done anything further upon these lots. These were not acts of possession, but were merely evidence of a claim of right. *Webb* vs. *Richardson*, 42 Vt., 465; *Kidder* vs. *Kennedy*, 43 Vt., 717; *Oatman* vs. *Fowler*, 43 Vt., 462. The claim of a right to land is an important element in making out possession, but is not enough of itself to make out possession at all. It is essential to give character to acts that would otherwise be mere trepasses and show them to be acts of ownership."

In *St. Louis Pub. Schools* vs. *Risley's Heirs*, 40 Mo., 370:

"Payment of taxes has been admitted in questions of adverse possession and may have an important bearing as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the statute of limitations, or for one to pay taxes having no claim or color of title."

In *Davis* vs. *Easley*, 13 Ill., 201:

"The tax receipts were also admissible. The payment of taxes indicated that the plaintiff claimed title to the whole tract. It likewise tended to explain the character and extent of his possession."

In *Elwell* vs. *Hinckley*, 138 Mass., 227:

"The books of the assessors of the town of Belchertown were put in evidence for the purpose of showing that the property was assessed to Hinckley during the years in which it was claimed that he was in adverse occupation, as tending to show this." *Held*, no error.

The following is quoted from ANGELL on LIMITATIONS, §397:

"But payment of taxes, in connection with certain other facts and circumstances which are notorious, and are strongly indicative of ownership, may amount to an actual possession in fact, which will run against the constructive actual possession of the owner, without the fact of inclosure. For instance, if the owner acknowledge himself out of

possession of the unenclosed and unimproved lands, and suffer the claimant to pay taxes upon it, or the like."

See also *Glascock* vs. *Hughes*, 55 Texas, 461.

So this evidence of the defendants' claim of title had a strong bearing upon the question of the lost grant.

In *Ricard* vs. *Williams*, 7 Wheat. 105, the Court say:

"Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership, and seizin of the inheritance. But, it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect, by construction of law to the acts of the party."

In *Cheeney* vs. *Watkins*, 1 Har. & J. (Md.) 527, it is said, that from very long possession of the land, the payment of taxes, &c., the jury may presume a conveyance.

And the fact that the land never had been assessed to any of the Fuller family since 1768, and that no one of them had ever paid any taxes upon it was evidence that they had no rightful claim to it, which the jury should have been so instructed as requested by the defendants.

In *Draper* vs. *Shoot*, 25 Mo., 204, the Court say:

"We do not maintain that the payment of taxes is evidence of an ouster of the true owner; but in a question of adverse possession, which depends on so many circumstances, such payment is a fact to be weighed by a jury in considering it. It would be an argument against one claiming to hold land, that he should for twenty-four years fail to pay the annual assessments upon it. If unexplained, such omission would certainly weaken the pretence that he claimed the land has his own, as such conduct is contrary to the course of men of ordinary prudence in relation to property to which they set up a claim. The payment of taxes may go to the jury with other circumstances, and this was a case in which such a fact was very appropriate for the consideration of the triers of the fact."

See also *Tingley Brothers* vs. *Providence*, 8. R. I., 493, (495, 503-4.)

Eleventh and Twenty-second Assignments of Error.

These may be considered together. They each present the question whether, under the very peculiar circumstances attending this case, the defendants were not entitled to have the jury instructed, as here requested, that public officers, particularly as to transactions of remote date and occurring beyond the memory of living witnesses, are to be presumed to have performed their duties, and as to the proper deductions to be made from this presumption. And as to the matters embraced in the eleventh assignment of error, this was coupled with the statutes of Rhode Island respecting the assessment of taxes (see appendix to brief pp. 15-16) which between 1798 and 1825, required the assessors to assess the tax to the persons who *held and occupied* the lands, and between 1825 and 1855, either to those who *held and occupied, or to the owners*, and after 1855, *to the owners;* and of course upon their strict compliance with these requirements depended the validity of the assessments, and the town's lien upon the lands and upon the tenants, occupants, and owners, for the payment of the taxes. It was, therefore, the express duty of the assessors to search out and ascertain who these tenants and occupants of the land under the earlier statutes, and who these or the owners under the later statutes, were, at their peril; and it is submitted therefore that under the conceded fact that ever after 1805, and as the defendants claimed, ever after 1768, these taxes had been assessed to the defendants and their ancestors in title, and never to the plaintiff or any of his family, these assessments were evidence of the defendants' possession and ownership, which they were entitled to have submitted to the jury, for their consideration.

See cases supra.

And so under the twenty-second assignment of error, the very purpose of the appointment of the town's committee in 1761, was for them to diligently search for land of this Fuller family for the support of their pauper children, and the same presumption arose, that the committee performed their duty; and the fact that they did not find and report this land, while they did find and report other land adjoining the original tract of which this was a portion, was therefore a fact, particularly taken in connection with its antiquity, which the jury might well consider.

And the refusal and neglect of the court practically to give to the jury any instruction whatever upon these points—for the request embraced in the twenty-second assignment of error, was absolutely refused, and the instruction that was given upon the other, that the defendants maintain that the persons who levied the taxes as officers, are presumed to have done their duty according to law, which is the case, was too vague

to give them any practical instruction, and did not at all meet the request—particularly taken in connection with the instruction that was given in another portion of the charge, that the payment of taxes did not prove possession, and that the defendants must prove an actual entry upon and actual occupation of the land, cannot but have most injuriously and unjustly prejudiced the defendants' case. From the very nature and circumstances of the case, these matters of taxation, with the two acts of conveyance of the land, the mortgage in 1796 and the deed in 1804, were the only evidence relating to the times back of the memory of living witnesses (which, as the case discloses, neither party could carry back of about 1820 to 1825) that the defendants could possibly produce of the possession, ownership and claim of their ancestors, particularly as the land was then wild woodland only; and these being by the court stricken from the consideration of the jury, left them virtually no evidence whatever as to these remote years to consider or act upon.

Twelfth, Thirteenth and Fourteenth Assignments of Error.

These involve the same questions of the construction and effect of the State statute, that we have considered under the seventh assignment of error; and to what we have said there, we need add nothing further.

Fifteenth and Eighteenth Assignments of Error.

These may be considered together. They also involve the proper constructions of the State statute—what acts are sufficient to interrupt the possession under it.

The case in the State Court *Union Bank* vs. *Taber*, *supra*, establishes that the possession to call this statute into operation, need not be *adverse* in the usual sense of that term as understood and applied under the Statutes of *Henry* and *James*, and the Statutes framed after them. In other words, it does away with the whole doctrine of *non adverse possession*, with which the English Courts, prior to the Statute of 3d and 4th *William* IV, were vexed, not to say confused and confounded. And it is submitted, that this has an important bearing upon the question, what should be the *nature*, *the kind*, *of entry* (assuming now for the sake of the argument, that any mere entry can under our statute suffice) that can be effectual to interrupt the possession. Can mere

temporary entries upon the land and occasional cutting of a little wood, though under claim of right, not brought home to the knowledge of the party in possession—for the instruction given did not require this—be enough? How can that interrupt which not only does not in fact interrupt, but does not even inform the occupant that his possession is claimed to be interrupted? And do these acts interrupt the possession under this statute, not only to prevent its running, but even as the Court here instructed the jury, to start new terms of twenty years from such formal entries, and so on, it may be, *ad infinitum*; in this case, indeed, making such actual, really, uninterrupted possession of over forty years after Mrs. Fuller became discovert before this action, of no avail. Assuming—which it is submitted is by no means clear—that such entry might be sufficient to purge a disseizin, under the doctrine of disseizin of the English cases, and as to which Ld. Mansfield, himself, had to say, that "the more we read, the more we shall be confounded," are the same principles to be applied under this statute?

See *McClung* vs. *Ross*, 5 Wheaton 116.

Sixteenth Assignment of Error.

It is unnecessary to elaborate this. The defendants were certainly entitled to the instruction here asked, and the only question is did the charge as given fairly meet it, It is submitted that it did not. As said by the Supreme Court of Pennsylvania in *Swank* vs. *Phillips* 4 Central Reporter 464.

"It is but fair to the parties when one puts a well constructed and definite point that it be either affirmed or denied. To do neither in express terms, and take occasion to repeat the substance of another point by the same party, is likely to be unsatisfactory to the other, if not ground for reversal."

And it is equally unsatisfactory and ground for reversal, for the party who makes the request.

Seventeenth Assignment of Error.

What we have said under the first five assignments of error, cover this one also.

Nineteenth Assignment of Error.

It is submitted that the defendants were entitled to the instruction here asked. An owner in possession is not accustomed to continually noise his claim of ownership abroad; and the fact that he does so, does therefore tend to show his knowledge and recognition that the lands are held adversly to him.

Twenty and Twenty-first Assignments of Error.

It is entirely settled in Rhode Island that a deed by a party out of possession is absolutely void.

Campbell vs. *Point Street Iron Works*, 12 R. I. 452.
Burdick vs. *Burdick*, 15 R. I. 574.

And it is submitted that the mere formalities attending the delivery of this deed to the plaintiff below disclosed by the case, whatever they may have been at common law or under the English doctrine of disseizin, were not sufficient, under these decisions and under the State statute of possession already considered, to make it effectual to pass the title to the plaintiff upon which to maintain this action of ejectment in his own name.

Twenty-third Assignment of Error.

The general doctrine of presumption — according to the maxim "*Omnia presumuntur rite et soleniter acta*"—as applied to transactions of remote date, has been already sufficiently considered. This request asked the Court to instruct the jury that it applied to ancient deeds made so many years ago that no living testimony could be adduced respecting them. Its bearing upon the defendants' case was apparent; for their title rested upon such a deed, viz., that of April 8, 1768. And the refusal of this request—particularly taken in connection with the instruction actually given as to the necessity upon the defendants proving an actual entry upon and occupation of the land, quoted

under the eleventh assignment of error—was, it is submitted, manifest error.

Twenty-fourth Assignment of Error.

It is understood that the Statute of James I, limiting real actions is still in force in Rhode Island. It certainly was introduced, or rather reorganized as in force there, in 1749, and was so to supply a manifest defect in the statute of possession of 1711.

See *Clarke* vs. *Cross*, 2 R. I. 448.

And as that defect has never been otherwise remedied the need of it is as great now as at any time heretofore.

If it be said that under the broad terms of the act of 1788 (see appendix to this brief, p. 14) it was repealed in toto, notwithstanding the expressed purpose of the repeal to provide only a more proper remedy for the limitation of personal actions, the reply is that it was again put in force by the revision of 1798, p. 78, sec. 5, which provided "That in all cases in which provision is not made either at common law or by the statutes aforesaid, the statute laws of England which have hertofore been introduced into practice in this State shall continue to be in force until the General Assembly shall especially provide therefor," a provision that, in substance, has been reenacted in every subsequent revision.

If this statue is in force, this request should have been granted, and it was error to refuse it.

Respectfully submitted,

WILLIAM H. GREENE,
JAMES TILLINGHAST,
Attorneys for Plaintiffs in Error.

APPENDIX

TO

BRIEF FOR PLAINTIFFS IN ERROR,

CONTAINING

SOME EXTRACTS

FROM THE

COLONIAL AND STATE STATUTES

OF

Rhode Island, &c.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886,

NO. 138.

LUCY W. FLETCHER, ET AL., PLAINTIFFS IN ERROR,

vs.

NATHAN FULLER, &c., ET AL.

In Error to the Circuit Court of the United States for the District of Rhode Island.

APPENDIX TO BRIEF.

SOME EXTRACTS

FROM THE

COLONIAL AND STATE STATUTES

OF

Rhode Island,

RESPECTING THE PROBATE OF WILLS,

INTRODUCTION OF

ENGLISH LAWS,

LIMITATION OF ACTIONS,

TITLE BY POSSESSION,

Assessing and Collecting of Taxes, &c.

APPENDIX TO BRIEF.

ACTS AND ORDERS,

Made and agreed upon at the Generall Court of Election held at Portsmouth, in Rhode Island, the 19, 20, 21 of May, Anno, 1647, for the Colonie and Province of Providence.

* * * * * * *

* * * * * * *

PROBATE OF WILLS.

Forasmuch, as all men are free to dispose of their owne as they please; Be it enacted by the present Assembly, that all persons inhabiting in this Colonie, be by this present act, put in mind of their owne Mortality, and the distraction which they shall leave behind them, may bring to the ryghtfull heyres thereof, if not kindly prevented; and that it is ordered, while they are in health and perfect memory to sett their houses in order, as if they were about to depart, and draw up their wills in writing, how their Houses, Lands, Goods, and Chattells shall be disposed of after their deaths, and do name an Executor or two to which they will committ the disposall thereoff, and so subscribe their names putt to their seale, and cause two or three witnesses to set their hands for confirmation thereof.

And be it further enacted, that the Executors, upon the death of the Testator, shall call in two honest neighbors, being his friends, or two honest persons, being the next of his kindred, and in their presence, and with their direction, shall make and draw up a true and perfect Inventory of all his Goods, Chattels, Wares, Merchandise, as well moveable as not moveable, and one draught thereof he shall deliver up to the head officer of the Towne, to whom the probate or approbation of wills shall belong, upon his solemn Testimonie, being of the nature of an Oath, that it is a good and true Inventory; and he, together with the witnesses, shall also deliver in the Will or Testament of the Testator, with the same solemn affirmation that it is the true, whole and last Testament of the same Testator freely made, and in his perfect memorie. And this Testament being thus proved before the head officer, the Towne Clerke shall transcribe or coppie out the Testament, putt wax into it, and then the head officer, by putting to it the seale of his office, shall declare his approbation of it; and so having taken sufficient Bond of the Executor, to pay the Tes-

tator's debts and faithfully to execute his Will and Testament, he shall give him power to administer.

Moreover, be it enacted by present Assembly, that both the Will and the Inventory shall be brought in within one month after the Testator's death, and that it shall be approved and power given to administer without delay; and in case the goods be in danger to be embezzled, then may the nearest of his kin take the Town Clarke, and they together with the Executor, or without him, may make an Inventory, or at least take a note of the Goods and Chattels of the Testator's left behind him.

And it is further ordered that the Will and Inventory shall be kept among the Records by the Recorder who shall eyther show or give a Copy thereof to such as require it, they satisfying him for his Labour and paines in so doing.

And it is further agreed, that for the Probate of Wills and giving power to administer, in case the testator's goods amount not to the sum of Five pounds, there shall be given but one shilling to the Towne Clerke. In case the goods be worth above Five pounds and under Fortie pounds, there shall be given three shillings and sixpence; two shillings whereof shall be given to the head officer, and eighteen pence to the Towne Clarke; and in case the goods be worth above Forty pounds clearly, then shall he pay five shillings; two shillings and sixpence whereof shall go to the head officer, and two shillings and sixpence to the Towne Clarke.

And be it further enacted, that in case a man dyeth intestate, or the Executor pitched upon refuse to administer, then shall ye head officer of the Towne, together with the Common Council of the same Towne, appoint one of his nearest kinsmen to take with him two other honest neighbors, and make and bring in a true Inventorie of his goods, which being brought in, they shall then make an equal and just distribution of his Estate among those to whom it does belong, the draught whereof being instead of the dead man's Will, together with the Inventorie, shall be left among the Records with the Recorder, and a Copy delivered into the hands of him whom they have chosen to be Executor, who shall have power (being first bound) to administer according to the Tenure thereof.

* * * * * * *

1 Rhode Island Colonial Records 147, 188–190.

LAWS,

Made and past by the *General Assembly* of His Majesty's Colony of *Rhode Island*, and *Providence-Plantations*, Begun and Held at *Newport*, the first Day of *March*, 1663.

* * * * * * *

* * * * * * *

An Act for the Probate of Wills, and Granting of Administrations.

BE IT ENACTED *By the General Assembly, and by the Authority of the same*, That the Power of proving of Wills, and granting of Administrations of the Personal Estate of persons deceased, shall be in the respective Town Councils of this Colony, where such persons deceased last Dwelt or Inhabited; which said Town Council, or the major part of them, shall have the Power, as Judge of Probates, to take the Probate of Wills and Testaments, and grant Administrations, and all other matters relating thereto, to Act and Do as by the Laws of *England*, and of his majesty's Colony doth belong to the said office.

And be it further enacted by the Authority aforesaid, That all Devises and Bequests of Land or Tenements, or of any Right or Interest in the same, shall be in writing, and Signed by the Party so devising the same, And shall be Attested and Subscribed in the Presence of the said Devisor, by three or four credible Witnesses, or else shall be Void and of none Effect.

And be it further enacted by the Authority aforesaid, That the Town Council of each Town, may Summons and Convent before them, all and every Person named Executor or Executors, of any Testament, to the intent to prove or refuse the Testament of his or their Testator; And to bring in Inventories of such Testator's Estate; And in case such Person or Persons take upon him or them, the Executorship, by proving the Will, that then at the same time, such Executor or Executors, shall give Bond to the said Town Council, that within one month after such Probate, he or they will Exhibit a true and perfect Inventory upon Oath, of the whole Personal Estate of the Deceased, as far as shall come to his or their knowledge; And that he or they will add thereunto, what and so much as may afterwards appear.

* * * * * * *

And be it further Enacted, That upon Probate of such Will or Testament, the Witnesses to the same, shall upon their Oaths declare, that they saw the Testator Sign, Seal, and Declare the same to be his last Will and Testament; And that in his Presence, they set their Hands as Witnesses thereunto, and the said Testator was in his perfect Mind and Memory, at the same time. Which said Testament being so proved, the Clerk of the said Council, shall transcribe a copy thereof, into the Book of Record, and deliver the Original to such Executor or Executors, with an Attest of its being Recorded. And the said Town Council, shall without Delay give to such Executor or Executors, under the Seal of the said Office, a Power to administer the said Estate.

* * * * * * * *

An Act Establishing Courts of Probate.

Section 1. BE *it enacted by the General Assembly, and by the authority thereof it is enacted*, That the Town Councils in the several towns in this State be, and they hereby are, constituted Courts of Probate; and they, or the major part of them respectively, shall have full power and authority to take the probate of wills, to grant administration on the estates of persons deceased, being at the time of their decease inhabitants of, or residents in, the town to which such Council may belong; and also to appoint guardians to minors, idiots, and persons *non compos mentis*, to examine, allow and settle, the accounts of executors, administrators and guardians; and to do and transact all such matters and things as the Courts of Probate within the several towns shall, by the laws of this State, have cognizance and jurisdiction of; and shall have power to issue such process as may be necessary for the discharge of the trust reposed in them.—*Public Laws of Rhode Island*—1798, *page* 276.

An Act Establishing Courts of Probate.

Section 1. *Be it enacted by the General Assembly, and by the authority thereof it is enacted*, That the town-councils in the several towns in the State be and they hereby are constituted courts of probate; and they, or the major part of them respectively, shall have full power and authority to take the probate of wills, to grant administration on the estates of persons deceased, being at the time of their decease inhabitants of or residents in the town to which such court of probate may belong; and also on the estates of persons who at the time of their decease were not inhabitants of or resident within this State at time of such decease; provided any of the rights, credits or estate of such deceased person shall be found therein; and the administration first granted shall be a bar to any other administration, although such deceased person may have left such rights, credits or estate in other towns; also, to appoint guardians to minors, idiots, and persons non compos mentis; to examine, allow and settle the accounts of executors, administrators and guardians; make partition of estates, and assign dower to widows, as prescribed by law; and to do and transact all such matters and things as the court of probate within the several towns shall by the law of this State have cognizance and jurisdiction of; and shall have power to issue such process as may be necessary for the discharge of the trust reposed in them.—*Public Laws of Rhode Island*—1822, *pages* 211, 212.

An Act Providing for and Directing the Manner of Filing and Recording Wills, Proved Without this State.

Section 1. *Be it enacted by the General Assembly, and by the authority thereof it is enacted*, That when the executor, or any other person interested in any will that has been proved and allowed in a court of probate in any of the United States, or in a court of probate in any other state or kingdom, shall produce a copy of such will, with a copy of the probate thereof, under the seal of the court where the same will has been proved and allowed, unto any court of probate in any town in this State, where the testator had estate, real or personal, whereon the same will may operate, and shall in writing desire the same may be filed and recorded in the probate office in such town, pursuant to this act, the said court shall assign a time and place for taking the same into consideration, and shall cause notice thereof to be given in some public newspaper, printed nearest to the place where said court is to be holden, three weeks successively, the first publication whereof shall be thirty days at least before the time assigned, to the end that any person may appear and show cause against the filing and recording the same; and if at the time assigned, no objection is made, or none in the judgment of said court sufficient to prevent it, the said court may cause the same copy to be filed in the registry of said court of probate, and direct the same to be there recorded; saving always, an appeal to any person apprehending himself aggrieved thereby, to the supreme judicial court, as in other probate cases; and the said court may grant letters testamentary to the executor therein named, or to the administrator appointed under the original will, they giving bond according to law.

Sec. 2. And be it further enacted, That when the copy of any will which has been proved and allowed in any court of probate in any of the United States, or in any foreign state or kingdom, shall be directed to be filed and recorded in any probate court of this state, pursuant to this act, the filing and recording thereof shall be of the same force and effect as the filing and recording of an original will, proved and allowed in the said court of probate.—*Public Laws of Rhode Island*—1822, *pages* 221, 222.

CHAPTER 155.

Of the Probate of Wills.

Section 1. No will shall be effectual to pass either real or personal estate, unless it has been duly proved and allowed in the court of probate; and the probate of a will devising real estate, shall be as conclusive as to its due execution, as in case of a will of personal estate.—*Revised Statutes of Rhode Island*—1857, *page* 359.

LAWS,

Made and Passed by the General Assembly of his Majesty's Colony of *Rhode Island*, and Providence Plantations, Held at *Newport* the Thirtieth Day of *April*, 1700.

An Act for *putting in force the Laws of England*, in all Cases where no particular Law of this Colony hath provided a Remedy.

BE IT ENACTED *by the General Assembly, and by the Authority of the Same*, That in all *Actions*, Matters, Causes and Things whatsoever, where *no particular Law* of this Colony is made to Decide and determine the same; that then and in all such Cases the *Laws of England* shall be put in Force, to Issue, Determine and Decide the same. Any Usage, Custom or Law to the contrary hereof notwithstanding.

A LAW,

Made and Pass'd by the General Assembly of Her Majesty's Colony of Rhode-Island and *Providence Plantations*, Held at *Warwick*, the Fourteenth Day of *November*, 1711.

* * * * * * *

An Act for *Quieting Possessions*, and *avoiding Suits at Law*.

WHEREAS *at the first settling of this Colony, and for sundry Years afterwards, Lands were of little or no Value, and skilful Men in the Law were much wanted, whereby many* Deeds, Grants *and* Conveyances *were weakly made, which may Occasion great contests in Law, if not timely prevented.*

BE *it therefore Enacted by the General Assembly, and by the Authority of the Same*, That all *Grants, Charters, Profits, Rights*, and *Privileges*, heretofore *Granted* and *Given* by the *General Assembly* of *this Colony*, unto any *Town, Corporation, Community* and *Propriety*, and to any other *Person* or *Persons*, shall be, and they hereby are *Ratified* and *Confirmed* to be Good and Effectual to all Intents and Purposes in the Law, for the Granting and Conveying all such *Lands, Tenements, Charters, Corporations, Privileges* as is therein mentioned, to the *Persons* therein mentioned, and their *Heirs and Assigns forever.*

AND *be it further Enacted by the Authority aforesaid*, That where any *Person* or *Persons*, or others, from whom he or they derive their Titles, either by *themselves, Tenants, Leases*, Hath,

Have or shall by the space of *Twenty Years*, be in the *Uninterrupted*, Quiet, Peaceable and *Actual Seizin* and *Possession* of any *Land* or Hereditaments within this Colony, for and during the said time, Claiming the same as his, her or their *proper*, *sole* and *rightful Estate in Fee Simple*, such *Actual* Seizin and Possession, shall be allowed to give and make a *Good* and *Rightful Title* to such Person or Persons their Heirs and Assigns forever; and *this Act* being Pleaded in *Bar* to any Action that shall hereafter be brought for such Lands, *Tenements* or Hereditaments and being duly *proved*, shall be allowed to be Good, Valid and *Effectual in the Law*, for Barring the same.

PROVIDED, That nothing in this Act shall be Construed, Deemed or taken, to Extend to prejudice the *Rights* and Claims, of Persons under Age, *Non Compos Mentis*, *Feme Coverts*, or those *Imprisoned* or *beyond Seas*, they bringing their Suit therefor, within the space of *Ten Years*, next after such Impediment is Removed.

LAWS,

Made and passed by the General Assembly of His Majesty's Colony of *Rhode Island*, and *Providence Plantations*, Held at *Newport*, by adjournment, the Third *Tuesday* of *February*, 1728.

* * * * * * *

An ACT for the Amendment of, and in Addition to several Laws, made and past in this Colony, as is hereinafter expressed.

* * * * * * *

WHEREAS *there is an Act made and passed in this Colony* in the *tenth Year of the Reign of Queen Anne*, *entitled*, An Act for Quieting of Possessions and avoiding of Suits at Law; *and therein is no Provision made for saving the Right of Persons* having any Estate *in Remainder or Reversion*, *Expectant*, *or Depending in Lands*, *Tenements*, *&c.*, *after the End or Determination of an Estate for years*, *Life*, *&c.*

For Amendment whereof for the Future, IT IS ENACTED *by the General Assembly*, *and by the Authority of the same*, That neither the aforesaid Act of Assembly, nor anything therein contained, shall extend, or be construed, or deemed to extend, to bar any Person or Persons, having any Estate in Remainder or Reversion, Expectant or Depending in any Lands, Tenements, or Hereditaments, after the End or Determination of Estate for Years, Life, or Lives, such Person or Persons pursuing his, or their Title by due Course of Law, within ten Years after his, her or their Right of Action accrues: Anything contained in the aforesaid Act to the Contrary notwithstanding.

CHAPTER 164.

Of Title by Possession.

WHEREAS, at the first settling of this State, and for sundry years afterwards, lands were of little or no value, and skilful men in the law were much wanted, whereby many deeds, grants, and conveyances were weakly made, which may occasion great contests in law if not timely prevented; therefore,

SECTION 1. All grants, charters, and conveyances heretofore made by the general assembly unto any town, corporation, community, or propriety, or to any other person or persons, whomsoever, shall be, and they hereby are ratified and confirmed as good and effectual to all intents and purposes in law, for the conveying all such lands, tenements, hereditaments, rights, privileges and profits as are therein mentioned, to the said towns, corporations, communities, proprieties, person or persons, and to their respective successors, heirs and assigns forever.

Section 2. Where any person or persons, or others from whom he or they derive their title, either by themselves, tenants, or lessees, shall have been for the space of twenty years in the uninterrupted, quiet, peaceable and actual seizin and possession of any lands, tenements, or hereditaments, for and during the said time, claiming the same as his, her, or their proper, sole, and rightful estate in fee simple, such actual seizin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs and assigns forever; and any plaintiff suing for the recovery of any such lands may rely upon such possession as conclusive title thereto; and this Chapter being pleaded in bar to any action that shall be brought for such lands, tenements, or hereditaments, and such actual seizin and possession being duly proved, shall be allowed to be good, valid, and effectual in law, for barring such action.

Section 3. Nothing in this chapter shall be construed, deemed, or taken to extend to prejudice the rights and claims of persons under age, *non compos mentis*, *femes covert*, or those imprisoned, or those beyond the limits of the United States; they bringing their suit therefor within the space of ten years next after such impediment is removed, or to bar any person or persons having any estate in reversion, or remainder, expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life or lives; such person or persons pursuing his or their title by due course of law within ten years after his or their right of action shall accrue.

* * * * * * *

Gen. Statutes of Rhode Island (1872) 353.

LAWS,

Made and passed at a General Assembly of His Majesty's Colony of Rhode Island *and* Providence-Plantations *in* New England *begun* and held by Adjournment at South Kingstown, on the last Tuesday of February, A. D. 1749.

Whereas this Assembly, at their Session in October last, appointed a Committee to prepare a Bill for introducing into this Colony, such of the Statutes of England, as are agreeable to the Constitution, and make Report of their doings; the greater Part of whom presented what followeth:

We the Subscribers, being appointed to report what Statutes of Great Britain, are, and ought to be in Force in this Colony, do Report as followeth:

That the following STATUTES, viz.

* * * * * * * *

The Statutes of Thirty-second of *Henry* the Eighth, concerning Leases, saving and excepting the last Paragraph of the said Statute. The Statutes of Twenty-first of James First, chap. 16th for limiting real Actions; and that of the Thirty-second of Henry the Eighth, Chap. 2d.

* * * * * * * *

All which Statutes, we are humbly of Opinion, have heretofore been, and still ought to be in Force in this Colony.

D. UPDIKE,
J. HONYMAN, JUN.,
J. APLIN.

And this Assembly having taken the said Report into Consideration, Do Vote and Resolve, That all and every of the Statutes aforesaid, be, and they are hereby introduced into this Colony, and shall be in full Force therein, until the General Assembly shall order otherwise.

A LAW,

Made and passed at the General Assembly of the Colony of *Rhode Island* and *Providence Plantations*, held at Providence on the First Monday in *December*, A. D. 1766.

* * * * * * * *

An ACT, regulating sundry Proceedings in the several Courts in this Colony.

Be it Enacted by the General Assembly, and by the Authority thereof it is enacted, That all the Courts in this Colony shall be held to, and governed by the Statutes, Laws, and Ordinances of this Colony and such Statutes of Parliament as are hereinafter mentioned, that is to say;

* * * * * * * *

The Statutes of { Thirty-second of *Henry* the Eighth, concerning Leases, saving and excepting the last Paragraph of the said Statute.
The Thirty-second of *Henry* the Eighth, and that of the Twenty-first of *James* the First Chap. 16th, for limiting Real and Personal Actions.

* * * * * * * *

several towns in this State, in assessing taxes for real estates, may assess the same either upon the owners of the real estates in the respective towns, or upon the persons who hold and occupy the same; and that in case the said taxes shall be assessed on the owners of such real estates, the real estates of such owners shall be liable for the payment and satisfaction of the said taxes; provided the same are not paid at the time appointed for the payment thereof: and in case the said taxes shall be assessed on the tenants or occupants of such real estates, the real or personal estates of such occupants, respectively, on whom the same shall be assessed, shall be liable for the payment and satisfaction of the said taxes so assessed; provided, nevertheless, that if the tenants or occupants of real estates, as aforesaid, are not possessed in their own rights of estates real or personal sufficient to satisfy the taxes assessed against them as aforesaid, the said real estates, by them occupied as aforesaid, shall be liable for the payment and satisfaction of the said taxes so assessed.

SEC. 2. *And be it further enacted*, That the fourth section of the act, to which this is in amendment, be and the same is hereby repealed.

Public Laws of Rhode Island—June, 1825, *page* 10.

An Act to Regulate the Assessing and Collecting of Taxes.

It is enacted by the General Assembly as follows:

SECTION 1. The electors of any town qualified to vote upon a proposition to impose a tax, &c. * * * * *

* * * * * * * *

Property, to Whom Taxed.

SEC. 19. Taxes on real estate shall be assessed to the owners, and separate tracts or parcels shall be separately described and valued as far as practicable.

* * * * * * * *

Public Laws of Rhode Island—January, 1855, *page* 19.

CHARLES HART,
WM. H. GREENE,
JAMES TILLINGHAST,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 138.

LUCY W. FLETCHER, *et al.*,
Plaintiffs in Error,
vs.
NATHAN FULLER, in his own right, and as Trustee for Truman B. Fuller and others.
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

THE Record contains twenty-seven exceptions, the first six being to alleged erroneous admissions of evidence, and the remainder to refusals to charge.

I.

First Exception to Admission of Evidence.

This exception is found in the record at folio 21, and may conveniently be considered in connection with the first exception to the refusal to charge, found at folio 56; the former

being an exception to the admission of evidence, and the latter to the refusal of the Court to charge the jury as to its effect.

The evidence objected to was a certified copy of the record in the Probate Office of the town of Lincoln, R. I.,— the town in which the land in controversy lies — of the will and codicil of Francis Richardson, together with its Massachusetts probate ; and the ground of the objection is, that the said will had not been filed nor admitted to probate in Rhode Island until after the commencement of this suit.

The refusal to charge which was objected to, was the court's refusal to instruct the jury that the defendant did not, under said will and codicil and probate filed and recorded, as aforesaid, show sufficient title to maintain the action, and that as he showed no other title the jury should find for the plaintiffs.

The said will and codicil is the foundation of the title of the defendant in error.

The will was dated May 29, 1749, and the codicil was dated Aug. 10, 1750, and they were duly probated Jan. 19, 1756, in the Probate Court of Bristol County, in the Colony of Massachusetts, where the testator resided at the time of his death, and a copy of said will and codicil and probate was duly recorded and filed in the probate office of the town of Lincoln, R. I., Aug. 27, 1881,— since the commencement of this action.

Record, fol. 21.

By the said codicil the land in dispute was devised to Abigail Fuller, wife of Ezekiel Fuller, of Smithfield, R. I., daughter of the testator, and she and her husband entered into possession, under the devise, before her death, which occurred some time prior to 1766, and, as we contend, prior to September, 1761.

Record, fols. 22 to 28.

Whereupon she became vested with the title to the land in

question. There was at that time no law of Rhode Island requiring that wills of non-residents relating to lands should be probated, and there was no tribunal empowered to take such probate.

Legislation Affecting Wills and Their Probate.

By the Act of March 1, 1663, which was in force at the time of the death of Francis Richardson, the jurisdiction of probate courts was limited, first, to wills of *personalty*, and secondly, to wills of residents of the colony, and so continued till 1798, when it was extended to wills of *land*, but was still limited to wills of *residents of the colony*.

Public Laws of 1730, Appendix, p. 1.
Public Laws of 1798, Appendix, p. 3.

By Act of the General Assembly of April 30, 1700, the laws of England were put in force in all cases where no particular law of the colony was made to determine the same.

Public Laws of 1730, Appendix, p. 3.

From 1798, the jurisdiction of the probate courts continued unchanged until 1822, when, for the first time, they were empowered to deal with wills of non-residents which had been proved and allowed in any other state or kingdom, and they were authorized to record and file a copy of the same with a copy of the probate, in the probate office of the town where there was any property on which it might operate, and such recording and filing was declared to be of the same force and effect as the filing and recording of an original will proved and allowed in said court ; and they were also empowered to grant administration upon such estates.

Public Laws of 1822, Appendix, pp. 4–5.

In 1857 an act was passed declaring that no will should be effectual to pass either real or personal estate, unless it has been duly proved and allowed in the court of probate; and

that such probate was as conclusive in case of wills of real estate as of personal estate.

Revised Stats. of 1857, Appendix, p. 6.

In 1872 the probate courts were empowered, for the first time, to take proof of wills of non-residents, where the testator had left estate in Rhode Island.

Gen. Stats., 1872, Appendix, p. 6.

In view of the foregoing legislation we submit:

1. The courts of probate in Rhode Island, are, and always have been courts of special and limited jurisdiction, whose power to act either in respect to subject matter or the mode of action, does not extend beyond the express grant of the statute.

Mathewson *vs.* Sprague, 1 Curtis, 457.
Grimes Estate *vs.* Norris, 6 Cal. 625.
Smith *vs.* Rice, 11 Mass. 507.

2. At the time of the death of Francis Richardson, in 1756, the jurisdiction of the probate courts was limited under the act of 1663: 1st. To wills of personalty. 2d. To wills of residents of the colony, unless, indeed, it is held that they acquired under said act and the act of 1700, a jurisdiction over wills coextensive with that of the Ecclesiastical Court. But in that case their jurisdiction over wills of non-residents was, like that of the Ecclesiastical Court, limited to wills of personalty.

3. Until 1798 there was no court having exclusive jurisdiction of even domestic wills of land, and the practice was to prove them as at common law.

Smith *vs.* Fenner, 1 Gallison, 170.
Spencer *vs.* Spencer, 1 Gallison, 622.

But by the act of 1798 their jurisdiction was extended to domestic wills of real estate.

Tompkins *vs.* Tompkins, 1 Story, 547.

4. Abigail Fuller and her husband having entered into possession under the devise to her, some time between the death of her father in 1756 and her own death, which occurred prior to September, 1761, (Record, fols. 22 to 28,) she acquired thereby a perfect vested title, and no act but her own could devest it. Indeed, she acquired a perfect vested title, whether she *actually* entered or not, for in the absence of a renunciation or disclaimer, and where there is no adverse possession, a devisee will be presumed to assent to a devise in fee which is absolute and without trust or incumbrances, and the title thereby vests without entry.

Ex parte Fuller, 2 Story, 327.
Doe d. Smyth *vs.* Smyth, 6 B. & Cresw. 112.
Coke Litt. 111 a.
Wilkinson *vs.* Leland, 2 Peters, 627–655.
4 Kent Com. 533.
Webster *vs.* Gilman, 1 Story, 499.

5. From 1798 the jurisdiction of courts of probate in respect to wills remained unchanged until 1822, when, for the first time, they were given the power to *record and file* a foreign will which had been probated abroad, and, therefore, from the beginning, down to that time, the only possible way open to Abigail Fuller or her heirs to prove the will and codicil was to prove it as at common law in any proceeding drawing her title in question.

Wilkinson *vs.* Leland, 2 Peters, 627.
Adams *vs.* DeCook, 1 McAllister, 258.
Adams *vs.* Norris, 23 How. 363.
Castro *vs.* Castro, 6 Cal. 161.
Grimes Estate *vs.* Norris, 6 Cal. 624.
Tivis *vs.* Pitcher, 10 Cal. 477.
Ives *vs.* Allyn, 12 Vt. 594.
Bagwell *vs.* Elliott, 2 Rand. 190.
Gaines *vs.* Chew, 2 How. 648.

The act of 1872 was the first express authorization of the courts of probate to take proof of a will of a non-resident as an original will, and if they theretofore possessed any power by virtue of the general ecclesiastical or probate law, over wills of non-residents, that power must necessarily have been limited, like that of the Ecclesiastical Court, to wills of personalty.

In England foreign wills of land were proved as at common law, the same as domestic wills of land.

Bovey *vs.* Smith, 1 Vern. 85.

6. The Act of 1822 was intended to be prospective in its operation. It was not mandatory but permissive in its character. By its terms it was not made retrospective in its operation, and therefore cannot be made so by construction.

Harvey *vs.* Tyler, 2 Wall. 328.
Sampeyrac *vs.* U. S., 7 Peters, 222.
McEwen *vs.* Bulkley, 24 How. 242.
Grimes Estate *vs.* Norris, 6 Cal. 624.

It declares that the recording and filing of a foreign will under its provisions should have the same force and effect as the recording and filing of original wills duly proved and allowed.

But the recording and filing of the Richardson will under this statute would have given the will no greater force or validity than it already had. It would have accomplished nothing more than a change in the mode of proving the title already vested under the will. The statute also speaks of the property "*wheron the same will may operate*" which language points to future cases, and not to property, the title to which has already vested.

The act of 1857, which declares that "no will shall be effectual to pass either real or personal estate unless it has been duly proved and allowed in the probate court," is pro-

spective in its operation, at least with respect to wills of non-residents. It certainly could not apply to a will under which title had already vested.

The courts had previously held that the jurisdiction of courts of probate over a domestic will was exclusive, and their judgments conclusive, and that it would not take notice of such a will until it had been probated.

Tompkins *vs.* Tompkins, 1 Story, 547.
Mathewson *vs.* Sprague, 1 Curtis, 457.
Moore *vs.* Greene, 2 Curtis, 202.

This statute, therefore, would seem to have been simply declaratory of the existing law, as laid down by the courts in those cases, and confined to domestic wills and to foreign wills subsequently executed.

7. Whether it is held that the act of 1822 operates prospectively only, or both prospectively and retrospectively, it is, nevertheless, in any event, an act relating to evidence merely. It does not create title ; it does not pretend to create it. Certainly it could not devest title. It, like the act authorizing courts of probate to take proof of domestic wills, is simply a mode of proof,— a method of ascertaining and of authenticating conclusively the validity of the will,— and when that fact is so ascertained the title relates back and takes effect from the death of the testator. The statute fixes no limit of time within which the foreign will may be recorded and filed, and it may be done at any time, even after suit brought upon the title under the will, and when so recorded and filed it may be used in evidence in such suit.

Poole *vs.* Fleeger, 11 Peters, 185.
Shepard *vs.* Carriel, 19 Illinois, 319.
Lessee of Hall *vs.* Ashby, 9 Ohio, 96.
Adams *vs.* DeCook, 1 McAlister, 253.
Shumway *vs.* Holbrook, 1 Pick. 116.
Waters *vs.* Stickney, 12 Allen, 17.

Marcy *vs.* Marcy, 6 Met. 370.
Ex parte Fuller, 2 Story, 327.
Spring *vs.* Parkman, 3 Fairfield, 127.
Hovey *vs.* Deane, 13 Maine, 35.
Mathewson *vs.* Sprague, 1 Curtis, 457.
Wilkinson *vs.* Leland, 2 Peters, 627.

The will in question having been duly recorded and filed under the statute, though after suit brought upon the title vested under it, was, therefore, properly admitted in evidence.

Irrespective of any probate whatever, the will was properly admissible, for a will defectively proved, or not proved at all, is admissible when both parties claim under it.

Giddings *vs.* Smiths, 15 Vt. 348.

The plaintiffs in error claim under the will and the title of Abigail Fuller.

Record, fols. 57–61.

II.

Second Exception to Admission of Evidence.

The second exception (Record, fol. 44) was to the introduction in evidence of the deed from the Fuller heirs to the defendant as trustee, and the power of attorney annexed, on the grounds:

1st. Of champerty appearing on its face.

2d. That the deed passed no title, as the plaintiffs were in the adverse possession of the land.

A. As to Champerty.

1. The Fuller heirs were so numerous it was impracticable to join them all in the suit, and it became necessary to

put the title in a trustee to prosecute for them, and one of their number, Nathan Fuller, was selected.

The clauses of the deed which, it is understood, are claimed to show champerty, are those which confer upon the trustee "the power to make such compromises of all legal proceedings and of the claims of said parties named as grantors herein to the above described premises, as he and said counsel shall deem to be for the best interests of the said grantors, and to make all sales and conveyances of said premises necessary for the payment of the fees of such counsel, and the expenses and disbursements incurred in the prosecution of said claims."

Record, fols. 37 and 38.

2. We submit there is not here, nor anywhere on the face of the deeds, the slightest indication of any champertous agreement, or that any was contemplated.

The deed simply confers upon the trustee the lawful and proper authority to compromise the grantors' claim, but placing upon the exercise of that power the check that such compromises must meet the approval of their counsel, selected by them to conduct the proceedings. This limitation upon the power of the trustee at most, evinces a distrust of his discretion, or, perhaps, his honesty.

Plainly, this they might do without taint of champerty.

3. Again, the power to sell is a power to deal with the land after the establishment of their title entirely independent of the control of counsel, and a direction how to apply the proceeds. It was a power that the trustee would have had, even without such specific authority, under his general power to prosecute, but was doubtless specified so that the trustee might have no doubt as to his power. Of course the heirs themselves might lawfully sell their land after they had obtained possession for the purpose of paying honest debts contracted in prosecuting their claim, and if so, they could properly delegate that authority to the trustee.

4. As between the grantors and the trustee there could be no champerty, for the trustee took no beneficial interest whatever, he was simply the agent of the grantors to hold the legal title and prosecute their claims at their expense and for their benefit.

5. As between the grantors and their counsel, the deed contained no trust or beneficial interest in their favor, which they could enforce.

Huff *vs.* Thomas, 1 T. B. Mon. 158.

There was no evidence as to the terms of the contract between the counsel and the trustee; *non constat* they may have been paid by money furnished by the grantors.

There was no obstacle to the plaintiffs showing what the contract was, had they chosen to do so, but apparently *presumptions* are more in their line.

6. Inasmuch as there was no evidence that the counsel had entered into a champertous agreement, and as the presumption is that their agreement was legal, the trust deed could not be tainted thereby.

7. To make out that the trust deed shows champerty on its face, they must show that it directed the trustee to make an agreement with the counsel to carry on the suit at their own expense, and as compensation to receive a part of the land in suit, and in pursuance thereof that such illegal agreement had been made.

The General Assembly of Rhode Island, in 1647, defined champertors as follows: "Champertors be such as move pleas and suits, or cause them to be moved eyther by their own procurement or by others, and sue them at their proper costs, and for maintenance have that of land in variance or the gains."

1 R. I. Colonial Records, p. 179, Appendix, p. 6.

This definition is almost identical with that given in 33 Edward I.

This law stands unchanged to-day in Rhode Island, and the act is made a criminal offense.

Martin *vs.* Clarke, 8 R. I. 389.
Orr *vs.* Tanner, 12 R. I. 94.

This definition is sustained by the authorities.

4 Blackstone, p. 135.
Scott *vs.* Harmon, 109 Mass. 237.
Moses *vs.* Bagley, 55 Geo. 288.
Allard *vs.* Lamirande, 29 Wis. 505.
Benedict *vs.* Stewart, 23 Barb. 420.
Duke *vs.* Harper, 66 Mo. 55.
Barker *vs.* Barker, 14 Wis. 142.
Wright *vs.* Tibbitts, 91 U. S. 253.
Stanton *vs.* Embree, 93 U. S. 557.
Major *vs.* Gibson, 1 Patton & Heath, 80.
Ramsay's Devisees, *vs.* Trent, 10 B. Mon. 341.

8. The court will not presume wrong doing on the part of the heirs, their trustee, and their counsel, if the language of the deed is capable of an innocent construction.

Lewis *vs.* Davison, 4 M. & W. 654,

and especially so, as it was easy for the plaintiffs in error to have removed all doubt by proof, which they neglected to do.

9. But even if any part or parts of the deeds were tainted with champerty, the taint could extend only to the parts so affected. It could not prevent the operation and effect of the deeds so far as they were lawful and the lawful parts were clearly separable from the unlawful parts, and not dependent upon them.

Chitty on Cont. 229.
Howe *vs.* Synge, 15 East, 440.

McAllen *vs.* Churchill, 11 Moore, 483.
Rogers *vs.* Tilley, 20 Barb. 643.
Fuller *vs.* Abbott, 4 Taunton, 110.
Dupre *vs.* Thompson, 4 Barb. S. C. 279.
Hawley *vs.* James, 5 Paige, 458.
Lorrillard *vs.* Coster, 5 Paige, 227.
Greenfield's Estate, 14 Penn. St. 508-9.
Darling *vs.* Rogers, 22 Wend. 490.
Savage *vs.* Burnham, 17 N. Y. 576.
Tapley *vs.* Coffin, 12 Gray, 420.
Ogden *vs.* Des Arts, 4 Duer, 281.

10. The true test whether a demand connected with an illegal transaction is capable of being enforced or not is, does the plaintiff require any aid from the illegal transaction to establish his case?

Simpson *vs.* Bloss, 7 Taunton, 246.
Chitty on Cont. 972.
3 Bouv. Inst. 611.
Roby *vs.* West, 4 N. H. 290.
Ferret *vs.* Hill, 23 L. J. C. P. 185,
15 C. B. 207.

11. The defendant is not asking any relief nor seeking the aid of the court in any way, to carry out or enforce the power to compromise or sell, or to enforce any trust for the benefit of the counsel, but is asking aid only to carry out the principal trust — that is, to establish the defendant's claim to the land as trustee for the heirs, and on his own behalf. This trust is entirely separable from, and is in no way dependent upon, said alleged invalid powers to compromise and sell.

The object of these deeds, as evident on their face, is to secure unity of action, to harmonize diverse views and interests, and so to prevent a multiplicity of suits in the prosecution of the rights of the defendants *cestuis que trusts*. Deeds to trustees for such purposes are not only strictly lawful, but in the clear interests of justice, and to them ought certainly to be

applied the maxim of construction, "*ut res magis valeat quam pereat.*"

This exception has no single legal or equitable consideration to support it.

12. This defense is an ungracious one and not favored by the courts, and though, where a plaintiff in proving his case is obliged to show that his title rests on a champertous agreement, the courts will not enforce it, yet they will not permit a defendant to escape payment of a just claim by setting up that the plaintiff has made a champertous agreement with his attorney to carry on the suit. The decisions are almost uniform on this point.

Hilton *vs.* Woods, 4 L. R. Eq. Cases, 439.
Ellenborough *vs.* Ayers, 10 L. R. Eq. Cases, 372.
Courtwright *vs.* Burns, 3 McCrary, 60.
Robinson *vs.* Beal, 26 Geo. 27.
Allison *vs.* The C. & N. W. R. R. Co., 42 Iowa, 280.
Whitney *vs.* Kirtland, 27 N. J. Eq. 383.
Small *vs.* R. R. Co., 8 N. W. R. 67.
Williams *vs.* Jackson, 5 Johns. 497.
Jackson *vs.* Brinckerhoff, 3 Johns. Cases, 100.
Van Dyke *qui tam vs.* Van Buren, 1 Johns. 346
McMullen *vs.* Guest, 6 Texas, 279.
Brinley *vs.* Whiting, 5 Pick. 352.
Fogerty *vs.* Jordan, 2 Robt. 324.
Cressinger *vs.* Lessee of Welch, 15 Ohio, 179.

B. *As to invalidity of deed on ground of plaintiffs' adverse possession.*

It will be convenient to consider in connection with this objection the seventeenth and eighteenth exceptions to the refusals to charge found at folio 79 of the record.

The requests are as follows:

"If the jury find that at the time the deed to the plaintiff of

May 24, 1874, was made the defendants were in the actual possession of the land, claiming the same as their own in fee simple, the deed was ineffectual as against the defendants to convey to the plaintiff any title to the land under the circumstances attending its delivery disclosed by the evidence."

The court declined to give this instruction and also declined to modify the instruction already given, which was as follows: "And if you find that in 1874 Theodore Fuller, under a power of attorney, went upon the land and delivered a deed to Nathan Fuller with a clod of earth, that would be sufficient to put the title in Nathan Fuller, and those whom he represents."

18th request. "That by the law of this state the conveyance by a party of land of which he is disseized passes no title as against the disseizor, and merely going upon the land and there passing the deed to the grantee with a handful of dirt taken from the land without the knowledge of the party in possession, and without actually disturbing his possession and enjoyment of the land, is not sufficient to give effect to the deed as against the party in possession." Which the court refused to give.

The substance of these exceptions is that the plaintiffs being in adverse possession, the entry of Theodore Fuller on behalf of the heirs, and of Nathan Fuller, and the delivery of the deed under the circumstances related in the testimony, (fols. 41 to 44), in the *absence of knowledge* on the part of the plaintiffs would not be a sufficient entry to revest the seizin, and that the charge above quoted is an incorrect statement of the law.

The question whether the Fullers had a right of entry was submitted to the jury under the direction of the court as to the law applicable thereto, and was found in favor of such right. (Record, fols. 73 to 76.)

And we therefore submit:

1. That, having such right, the entry made was effectual to revest the seizin.

The entry was openly made in the day-time, in the presence of several persons, not furtive nor clandestine, but open to the view of the world, and made with the purpose of revesting the seizin, by claiming and exercising rights and performing acts of dominion and ownership over and upon the land. (Record, fols. 41 to 45.)

It was immaterial whether the plaintiffs had notice or not, provided the entry was of such a character that they *would have had notice, had they been personally present.* In this respect of necessity of notice, it differs from an entry by a disseizor. In the latter case the title by adverse possession rests upon the tort of the disseizor, and the presumed acquiescence of the true owner, and so notice of the disseizin must be brought home to him in some way upon which to found the acquiescence, but in the case of a reëntry by the true owner he is in as of right, and the seizin, in contemplation of law, passes to him instantly.

The entry of the character and with the formalities described, and the delivery of the deed on the land was an exercise of dominion of the highest character and was sufficient to purge a disseizin.

Coke on Litt. 245 b.
Taylor's Devisees *vs.* Burnside, 1 Grat. 203–204, 212.
Burrows *vs.* Gallup, 32 Conn. 499.
Peabody *vs.* Hewett, 52 Maine, 44, 46, 52.
Stearns' Real Actions, 42, 44.
Brickett *vs.* Spofford, 14 Gray, 518–519.
Royer *vs.* Benlow, 10 Serg. & R. 306.
Robison *vs.* Swett, 8 Greenleaf, 316–324.
Farwell *vs.* Rogers, 99 Mass. 33.
Birthright Lessee of Hall *vs.* Hall, 3 Mumf. 541.
Warner *vs.* Bull, 18 Met. 4.
Knox *vs.* Jenks, 7 Mass. 498.
Oakes *vs.* Marcy, 10 Pick. 198.

2. The deed being a trust deed for the sole benefit of the

grantors themselves, and a step in the orderly and convenient assertion by suit at their own expense of their right to the land, it does not come within the purview of the law which holds that a disseizee out of possession cannot convey land held by another adversely. That law was aimed at maintenance, but the grantors themselves are the real defendants in error here. The deeds, clearly, do not come within the reason of the rule and therefore the rule does not apply.

There was no error in the court's admitting them in evidence nor in its refusal to charge as requested. The charge of the court upon this point found at folio 79 of the record taken in connection with the evidence (fol. 41 to 45 of Record) is a correct and sufficient statement of the law of the case.

III.

Third and Fourth Exceptions to Admission of Evidence.

The third and fourth exceptions (Record, fol. 52) taken by the plaintiffs in error, on the ground of irrelevancy, immateriality, and inadmissibility are (1) to the admission by the court below of evidence that in the year 1835 the Fullers, ancestors in title of the defendant in error, brought an action in the proper court against certain persons with whom the plaintiffs in error were not in privity of title or ancestry, for the recovery of another portion of the 22¼ acre lot originally devised by Francis Richardson to Abigail Fuller, and delineated on the diagram, a copy of which appears in the record between pages 10 and 11, and that the same was afterwards discontinued on account of poverty and pecuniary inability to carry it on, and (2) on the same grounds of irrelevancy, immateriality, and inadmissibility, to the admission of a copy of the record of the proceedings in said action.

But the court did not err in admitting this evidence or any part of it,

Because it was evidence, both relevant and competent, to rebut the presumption of a lost deed claimed by the plaintiffs in error, at the trial below. Said plaintiffs had already offered in evidence, and they had been admitted against the objection of the defendant, town records of said town of Smithfield claimed by said plaintiffs as showing or tending to show the assessment to, and payment by said plaintiffs of taxes on this land between 1770 and 1804, and evidence of the assessment to, and payment by them of the taxes thereon since 1804, for the purpose of showing, or as tending to show, acquiescence in the right of the said plaintiffs based on a lost deed. (Record, fols. 49 and 50.) The evidence so offered by the said defendant and admitted by the court against the objection and exception of the plaintiffs, was both relevant and material for the purpose of showing the reasons for such seeming acquiescence, if any, and so rebutting the presumption of a lost deed. Different parts of the original estate devised to Abigail Fuller were, at the time of said proceedings, claimed by different parties, and separate suits were, therefore, necessary to establish defendant's title to said estate. The evidence shows that almost immediately after the decease of Benjamin Fuller, or of his wife, Abigail, the Fullers began to assert their title at law to their ancestral property, but were too poor even to maintain the first suit commenced therefor, and had to abandon it for want of means to carry it on, and so, of course, too poor to maintain a half dozen or more suits necessary to establish their title to this and other parts of their ancestral estate; and so tends to rebut the presumption of a lost deed, if any, arising or liable to arise from such seeming acquiescence of the defendant and his ancestors in title in the claimed assessment to and payment by the plaintiffs of taxes, and from their seeming neglect to assert their title by suits at law.

IV.

Fifth Exception to Admission of Evidence.

The fifth exception taken by the plaintiffs in error is to the

admission of testimony of witnesses that they had been informed that the suit mentioned in exceptions third and fourth, and at folio 52 of the record, was discontinued on account of the poverty and pecuniary inability of the plaintiffs therein to carry it on.

The court did not err in admitting the testimony,

1. Because, if the information came from proper parties, it was material and relevant, as we saw in discussing exceptions third and fourth, to the question of the presumption of a lost deed. It must be presumed that the witnesses had been so informed by competent persons and at proper times, since the record does not set forth that the information came from incompetent parties or at improper times, and being the record of the plaintiffs in error, by the rule of construction *contra proferentem* it must be taken most strongly against them.

2. Because the grounds of this exception were not stated at the time of trial and are not now stated in the record.

3. Because if the evidence was objectionable on the ground of hearsay its admission was harmless, since the record shows (fol. 52) that the defendant had proved the fact by evidence that was not objectionable on that ground.

V.

Sixth Exception to Admission of Evidence.

The sixth exception taken by the plaintiffs in error is to the admission by the court below of the testimony from a large number of witnesses, (1) as to the poverty of the defendants *cestuis que trust* and of those from whom the defendant derived title; (2) also statements by members of the Fuller family and of numerous other persons living in the vicinity of the property, whether connected with either of the parties to the case or not, and unconnected with any act upon the land itself,

of the claims of the Fuller family to the land in question; (3) and the general notoriety of the same; (4) and the tradition of this claim in the Fuller family; (5) and their claim to other parts of the original 33⅓ acre tract as bearing upon the question of the presumption of a lost deed.

The court did not err in admitting this testimony, for it is evident that the entire evidence, with the possible exception of the claims to other parts of the 33⅓ acres (which if immaterial can work no possible harm to the plaintiffs in error), goes to rebut the presumption of a lost deed which rests on the acquiescence of the owner, in showing that the Fullers have always claimed the land notoriously and were unable by poverty to assert their title other than by making entries and cutting and carrying off wood under claim of right, as shown in the record at fols. 51, 52, and so shows that there was no acquiescence on which to found the presumption.

VI.

First Exception to Refusal to Charge.

This exception has already been considered under paragraph I.

VII.

Second Exception to Refusal to Charge.

The request is found at folio 56 of the record as follows: "Unless the jury find that Mrs. Fuller, senior, was actually seized of the land in question during her life, her husband, Ezekiel Fuller, would have no estate by curtesy in it."

The court correctly refused to charge in these terms.

1. The proposition contained in the request to charge is

not correct. Where no adverse possession exists a potential or constructive seizin is sufficient to give curtesy.

Union Savings Bank *vs.* Taber, 13 R. I. 700.
Davis *vs.* Mason, 1 Peters, 503.
Bush *vs.* Bradley, 4 Day, 305.
Day *vs.* Cochrane, 24 Miss. 276.
DeGrey *vs.* Richardson, 3 Atkins, 469.
Chew *vs.* Commrs., etc., 5 Rawle, 161.
Stoolfoos *vs.* Jenkins, 8 Serg. & R. 175.
Kline *vs.* Beebe, 6 Conn. 499.
Doe v Thomas 4 Scott N.R. 449

2. In the absence of renunciation or disclaimer, a devisee will be presumed to assent to a devise in fee which is absolute and without trust or incumbrances, and the title thereby vests without entry.

Ex parte Fuller, 2 Story, 327.
Doe d. Smyth *vs.* Smyth, 6 B. & Cresw. 112.
Coke Litt. 111 a.
Wilkinson *vs.* Leland, 2 Peters, 627–655.
4 Kent Com. 533.
Webster *vs.* Gilman, 1 Story, 499.

3. Abigail Fuller was actually seized of the six-acre lot adjoining the twenty-two and a quarter acre tract, and she will, therefore, be deemed to be actually seized of the latter, also, without proof of actual entry in the absence of any renunciation or disclaimer of the devise.

Record, fols. 21 and 29.
Mercer's Lessees *vs.* Selden, 1 How. 54.

4. This land in dispute was vacant and unoccupied — a forest primeval — and continued in that state until 1858, (Record, folio 47) although we willingly admit, if our adversaries desire it, (though it does not so appear in the record) that a part of the narrow strip lying between the Abigail

Fuller six-acre lot and the Ezekiel Fuller twenty-acre lot, shown on the diagram at page 10 of the record, had, at a former time, been cleared, and at one time had thereon a dwelling-house and fences of some kind.

A *feme-covert* devisee of land of this character and condition, where there is no adverse possession, is sufficiently seized to sustain curtesy without actual entry.

Jackson *vs.* Sellick, 8 John, 208.
Barr *vs.* Galloway, 1 McLean, 476.
Ward *vs.* Fuller, 15 Pick. 185.
Green *vs.* Chelsea, 24 Pick. 71.

5. The claim of the plaintiffs in error is that their ancestor, Stephen Jenks, held under Abigail Fuller's title through Jeremiah Richardson, and that the deed or deeds from said Abigail to said Jeremiah are lost. This claim necessarily concedes the constructive seizin at least of said Abigail.

Record, fol. 58 to 61.

6. The evidence in this case renders it entirely immaterial whether or not she ever had an actual seizin, or whether or not such a seizin was necessary to give her husband an estate by curtesy, because the existence of such an estate would be of no advantage to his daughter Abigail as a protection against any adverse possession that did not commence prior to her marriage with Benjamin Fuller, in 1779, inasmuch as she was protected by her coverture from 1779 until long after the termination of the estate by curtesy, if it ever existed, to wit, until 1842, ten years after the death of her husband, Benjamin Fuller.

There was no evidence of any such possession prior to that date, and therefore the proposed charge was inapplicable to the evidence before the jury, and was rightly refused.

7. The evidence, however, tended to show that Abigail Fuller *and* her husband, Ezekiel, actually entered into possession of the land under the devise. (Record, fol. 22.) There-

fore the request and the refusal to charge, and the charge which had already been given, must be considered in connection with, and with reference to that evidence.

The charge in effect, substantially covered the entire ground of the request, although not in the exact terms asked for. The jury were instructed that if neither Abigail Fuller nor her husband entered into possession under the devise, then Abigail Fuller could not give what she did not obtain, and that would be an end of the plaintiff's case, and if Ezekiel Fuller or Abigail Fuller did enter into possession under the devise of Francis Richardson, and there was no early deed, and they did not presume a grant, that then they might leave that part of the case and come to the statute of possessions (Record, fols. 56 and 57).

It was of no importance that the jury were not told that Ezekiel Fuller would have gained no estate by curtesy without actual seizin of Abigail, even though that were a correct legal proposition, because they were told to find for the plaintiff in error, unless they did find that Abigail or her husband entered into possession under the devise, or, in the language of the request, unless they found that she "was actually seized of the land in question."

This statement, we submit, was an error of the court, but it was an error that operated against the defendant in error, and was in favor of the plaintiffs in error, and of which they cannot complain.

The jury found that Abigail Fuller *and* her husband both entered under the devise, and, of course, she gained an actual seizin, and Ezekiel gained an estate by curtesy.

But if we assume the correctness of the legal proposition stated in the request (which we do not admit), the instruction of the court, though possibly not in the best form of words, was still correct and sufficiently intelligible, and was rightly interpreted by the jury with reference to the evidence, and was substantially a compliance with the request, and, therefore, there is no sufficient ground for reversal.

Rogers *vs.* The Marshal, 1 Wall, 644.

VIII.

Third Exception to Refusal to Charge.

The third request to charge made by the plaintiffs in error, to the refusal of which they except, is found at folio 57 of the record, and is as follows, viz.:

"It is within the province of the jury to presume a lost deed to quiet a title attended by long possession, where they are satisfied that the circumstances of the case justify it. And this presumption is not necessarily restricted to what may fairly be supposed to have in fact occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor."

The court did not err in so refusing to charge,

1. Because the proposed charge, even if it stated the law correctly, is made up of mere abstract statements without reference or application to the evidence in the case;

Dwyer *vs.* Dunbar, 5 Wall. 318, 319, 325.
Browning *vs.* State, 18 Texas, 713-733
The Blue Wing *vs.* Buckner, 12 B. Mon. (Ky.) 246.

2. Because the charge as proposed does not correctly state the law, and is made up of propositions so vague and uncertain that to make it would put the defendant completely at the mercy of the jury; for

a. It instructs the jury that they are absolute judges of both law and fact, and, as such, are entitled to ignore the real facts and circumstances of the case, as they are developed by the testimony, and to conclude the defendant upon the mere incidents or surroundings of the case as they affect their prejudices or whims.

b. It authorizes the jury to infer that in the opinion of the court it is their duty, or in their province, to disregard the clear evidence of the defendant's title and to quiet the plaintiffs' title, although the evidence shows that the latter can have no foundation in right.

Riviere *vs.* McCormick, 14 La. Ann. 139.

Jeremiah Richardson's deed to Stephen Jenks shows that he claimed title from his grandfather, Francis Richardson, (Record, fol. 60); but his grandfather had devised it under will, duly admitted to probate, to Abigail Fuller. (Record, fol. 21.) He was too young to purchase it of his aunt, said Abigail, before she died, (Record, fol. 45); and so was his brother, Francis, (Record, fol. 45); and Ezekiel Fuller, Jr., who inherited from his mother, Abigail, by right of primogeniture, was too young to sell to Jeremiah or Francis, (Record, fol. 30).

c. It authorizes the jury to infer that, in the judgment of the court, the plaintiffs' title is attended by a possession of such character and duration as to justify them in ignoring the evidence, and in presuming a lost deed to quiet it, when the evidence clearly shows not only that there could have been no such deed, but that there was no such possession.

Record, fol. 51.

3. Because the court had already in clear and unmistakable terms, instructed the jury in the law relating to presumptions of lost deeds, and had told them that they were at full liberty to presume such a deed from all the facts and circumstances offered in evidence by both parties, if, in their judgment, such facts and circumstances were more favorable to such presumption than against it; and to that end had allowed to go to the jury every scrap of evidence offered by

the plaintiffs and all comments thereon made and all conclusions therefrom drawn by counsel in argument.

Record, fols. 57–61.
Laber *vs.* Cooper, 7 Wall, 566.

IX.

Fourth, Tenth, and Eleventh Exceptions to Refusals to Charge.

Counsel for plaintiffs in error requested the court below to charge the jury as follows, viz.:

"That under the Statute of Possessions of this State which has been in force here since the year 1728, twenty years' uninterrupted, quiet, peaceable, and actual seizin and possession of any land, for and during the said time claiming the same as his, her, or their proper, sole, and rightful estate in fee simple, creates in the possessor a good and rightful title to the land so occupied, and if, at the commencement of any such possession, the person holding the title is under disability, such person can only avoid the title so acquired by the adverse occupant by suit commenced within ten years after the removal of the particular disability which existed at the time such possession commenced." (Fourth Request, Record, fol. 61); also,

"That if the jury find that the defendants (plaintiffs in error) and those from whom they derive title to the land in question, have, for any twenty years prior to the death of Benjamin Fuller, in 1832, been in the uninterrupted, quiet, peaceable, and actual seizin and possession of the land, for and during any such twenty years, claiming the same as his, her, or their proper, sole, and rightful estate in fee simple, they thereby acquired a good and rightful title to the land, which could be avoided only by suit brought within ten years after

the death of Benjamin Fuller, by Mrs. Fuller, grandmother of the plaintiff (defendant in error,) or those claiming under her; and the defendants (plaintiffs in error,) would therefore be entitled to a verdict." (Tenth Request, Record, fol. 71); and also,

"That if the jury find that such possession by those from whom the defendants (plaintiffs in error) derive their title, commenced prior to the marriage of Abigial Fuller, grandmother of the plaintiff (defendant in error) and continued for twenty years, they, during that time, claiming the land as their proper, sole, and rightful estate in fee simple, and also find that her father, Ezekiel Fuller, had a life estate in the land, as tenant by the curtesy, the defendants' (plaintiffs' in error) ancestors-in-title thereby acquired a good and rightful title to the land, which could be only avoided by suit by Mrs. Fuller, grandmother of the plaintiff (defendant in error) within ten years after the death of her father, Ezekiel Fuller, and the defendants (plaintiffs in error) will then be entitled to a verdict." (Eleventh Request, Record, fols. 71, 72.)

But the court refused each of these requests, and the defendants (plaintiffs in error) excepted in each case.

It is clear from the charge of the court, as it appears in the record, that the *vital*, if not the *sole* cause for its refusal to comply with these requests, is a single construction which it gives to the proviso of the statute of possessions; and since the three exceptions must stand or fall with that construction, they may properly be considered together. The three requests are, that the court charge that the operation of the statute can be avoided *only by suit* brought within ten years after removal of a disability named in the proviso. The court declined to so charge, but did charge in the most explicit terms, and refused to modify its charge, that the operation of the statute could be avoided either by *entry* or by *suit*. Was this charge correct? If it was, all three exceptions must be overruled.

If the statute of possessions stood alone and without historic relation to or connection with the common and statute law of England, and the centuries of judicial interpretation thereof, the narrower construction asked for by the plaintiffs in error might be a plausible one. But the defendant here contends for the broader construction, and claims that the court did not err in refusing any of the requests, since,

1. The statute stands side by side with the statute of 21 James I., Cap. 16, for limiting real actions, and the history of the two statutes shows that they can, in no sense, be in conflict or inconsistent with each other.

Prior to 1711 the statute of James was in full force in Rhode Island — there never having been any specific statute of limitations passed by the Colonial Assembly, and it having been provided by act of the Assembly of 1700, "that in all actions, matters, causes and things whatsoever where no particular law of the colony is made to decide and determine the same . . . the laws of England shall be put in force to issue, determine and decide the same, any usage, custom or law to the contrary . . . notwithstanding." Appendix, p. 8. In 1711 was passed the statute of possessions, heretofore quoted, with a saving in favor of minors, *non-compotes*, *femes-covert*, and persons in prison and beyond the seas, but without saving for remainder-men or reversioners. In 1728 a saving was added in favor of both remainder-men and reversioners. This statute, so completed, with both savings, is substantially the same as the one on our statute-book to-day. That the passage of this statute did not repeal, and was not intended to supersede the statute of James, is clear from the report of the select committee of the Colonial Assembly, appointed in 1748, "to prepare a bill for introducing into the Colony such of the Statutes of England as are agreeable to the Constitution, and make report of their doings," incorporated in the act of 1749, which expressly declares that, in the opinion of the committee, the statute of James had theretofore been in force in the colony,

and still ought to be in force; and also from the act itself, which, evidently intended to remove all doubt on the subject, expressly introduces it into full force in the colony. Appendix, p. 7. In 1766, in "An Act Regulating sundry Proceedings in the several Courts in this Colony," its existence as a part of our colonial law is reaffirmed, and, so far as it relates to real estate and actions relating to real estate, it has never been repealed. The reasons for its existence as a part of our law are as potent now as in 1747; and it stands to-day, as in 1700, the law of Rhode Island. Indeed, the late Chief-Justice Brayton, in Clarke *vs.* Cross, 2 R. I. 448, 449, in comparing and contrasting the two statutes, treats them as in full force together, and in harmony with and supplementary to each other.

General Statutes R. I., 1872, p. 630. Appendix, p. 8.

Since the two statutes have been in force together from 1728, and no substantial change in the language of either has been made or deemed necessary for nearly two centuries, it follows that they are not and cannot be in conflict or inconsistent with each other. And this conclusion must follow as well as to the provisos as to the bodies of the statutes. Had there been any conflict between them it must have been seen at once and cured by amendment. It it not conceivable that it could have escaped the notice of the special committee of 1747 who, according to their report, were of the opinion that the statute of James had theretofore been in force and still ought to be in force in the colony, and upon whose recommendation was passed the act of 1749, introducing it into full force side by side with the colonial statute of possessions. Indeed, if there were any inconsistency between the two statutes the express adoption of the statute of James in 1749, subsequent to the enactment of the statute of possessions, would *proprio vigore* repeal so much of the latter as was inconsistent with the former. Potter's Dwarris 154, 155, and notes 4 and 5; Cool *vs.* Smith, 1 Black, 459; Van Rensse-

laer *vs.* Snyder, 9 Barb. 308. And Chief-Justice BRAYTON in Clarke *vs.* Cross, 2 R. I. 448–449, heretofore cited, says :

"The statute of James supplied a defect in the statute of possessions in this, that unless the defendant had been in possession for twenty years, claiming the land all the time as his own in fee simple, though the plaintiff may never have been in possession, he could not defend against the plaintiff, but he must stand upon his original title or his possessory title. Now, if we suppose the statute of James to have been introduced to cover this defect, as it is reasonable to do, then we may and must presume that the saving was such, and no other, as was attached to the statute of possessions, and that no person should be saved by it who would not be saved by the statute of James. In the statute of James, the saving was more clearly expressed and had received a construction such as we have now given. It was introduced with the construction put upon it by the English courts and (it may be reasonably inferred) because the proviso was understood to be the same in substance as in the statute of possessions."

2. The two statutes are *in pari materia* and are to be construed together, Clarke *vs.* Cross, 2 R. I. 448, 449. They aim at the same end, *i. e.*, quieting possessions, and avoiding suits at law. They operate in different ways — one making prominent the right of entry of the true owner — the other the possession of the adverse occupant. The statute of possessions provides that an uninterrupted, quiet, peaceable, and actual seizin and possession for twenty years under claim of title in fee simple, shall give good title and bar the whole world except persons under specified disabilities. The statute of James provides that the holder of the legal title shall be forever barred unless he makes entry or brings suit within twenty years, but makes a saving in favor of the same parties as named in the proviso of the statute of possessions; and it is universally recognized as a complete defense, under the statute of James, to a suit by the holder of the legal title that the defendant has been in the uninterrupted, quiet, peaceable, adverse, and actual seizin

and possession for twenty years. The very qualities of the possession defined in the statute of possessions are the ones universally given by the adjudicated cases in England and America to the possession which can defeat the true owner under the statute of James. In fine, the two statutes relate to the same subject matter, the same rights and claims, employ, or necessarily imply, the same terms and save the same classes of persons from their operation. The main, if not the only difference in the ultimate effect of the two statutes, is that the statute of James goes a step further towards attaining the common object, to wit, requiring that the holder of the legal title shall be cut off, regardless of the short-comings of the party in actual possession, unless he shall have made entry or brought suit within twenty years.

No difficulty has been found in harmonizing the language or the operation of the bodies of the two statutes. But the language of the two provisos, which were intended to benefit the same classes of persons, for the same time, and in the same way, is at first sight seemingly at variance. The proviso in the statute of James gives to the person legally entitled and intended to be saved, in clear terms, the right to make entry or to bring suit just the same as if the land had not been for twenty years in the uninterrupted, quiet, peaceable, and actual seizin and possession of the occupant under claim of right in fee simple, "so as," to quote from the proviso, "such person take benefit of and sue forth the same within ten years next" after removal of the disability.

The language of the proviso of the statute of possessions is not so clear and explicit as this, but a careful examination and comparison will remove the seeming conflict, and will show their identity. The uninterrupted, quiet, peaceable, and actual seizin and possession under claim of right in fee simple, shall not, quoting the language of the proviso, "be construed, deemed or taken, to extend to prejudice the rights and claims

of persons under age, *non compos mentis*, *femes-covert*, or those imprisoned, or those beyond the limits of the United States, they bringing their suit therefor within the space of ten years after such impediment is removed." What, then, were the rights and claims which the holder of the legal title under disability had, which were not to be prejudiced by the body of the statute? The language is not "right" or "claim" to the land, but "rights" or "claims" relating to the land, for which they are to bring suit within ten years after removal of the disability. Were not these the very rights and claims which were specified in and contemplated by the proviso of the statute of James, and the same that had belonged to the holder of every legal title to land, where the common law of England has been in force from the time of William the Conqueror? Was it ever questioned that he in whom resided the legal title, if dispossessed, could enter peaceably upon the land, and so break the continuity of the adverse possession, or in case he could not enter peaceably, could bring suit upon his legal right of entry to obtain forcible possession?

Jackson *vs.* Haviland, 13 Johnson, 235.

It is a maxim of our law that there is no wrong without a remedy, and it is a principle of law embedded in the very charter of our liberties, that "no man shall be deprived of his property without due process of law." But there is no express saving in the whole body of our statute law in favor of those who are unable to meet the expense of extended and expensive litigation against the rich. What, then, is the remedy for those who are deprived of their lands, and who have not the means to assert their rights in litigation, since there must be some remedy within their reach to keep alive their rights, as effectual as the bringing of suit? Is it not this very right of entry with the right of continual claim where entry cannot be peaceably made, which is so closely interwoven with our laws relating to real estate?

Nor is there any real conflict between the final clauses in

the two provisos. That of the statute of possessions is "they bringing suit therefor within ten years after removal of the disability," and that of the statute of James is, "so as they take benefit of and sue forth the same within ten years." In each case the condition seemingly is fulfilled only by bringing suit within that period. The language is as peremptory in the one case as in the other. But it is the unvarying construction of this clause in England and in this country that entry may be made at any time during the ten years with the same effect as if made before the twenty years of adverse possession were completed, and if not made by reason of neglect or inability, or the right of entry kept alive by continual claim, the right or claim of the owner is lost if no suit is brought to enforce the right of entry within the ten years. Indeed, the proviso of the statute of James expressly declares that the party saved may continue to make entry during the ten years after removal of the disability, in the same manner and with the same effect, notwithstanding the twenty years of adverse possession. The right of entry remains unimpaired for ten years, but unless entry is actually made within that time, or the right kept alive through continual claim, the right expires, unless suit is brought to enforce it before the expiration of the ten years.

Angell on Limitations, Chap. XXXVI., § 6, and note.
Appendix, Angell on Limitations, 3, 4.

The proviso of the statute of possessions, therefore, in the absence of legislation recognizing a variance between the provisos of the two statutes, and providing a remedy therefor, when it says that the twenty years' possession under the statute shall not be so construed as to prejudice the rights and claims of the persons under the disabilities specified, means shall not be so construed as to prejudice among other rights the right of entry and the right to enforce that right or claim of right by suit, provided that the entry be

made within ten years, or if not so made from neglect or inability, and the right is not kept alive through continual claim, that suit to enforce that right or claim be commenced within the ten years — rights and claims settled and recognized for centuries as a part of the common law and particularly specified and saved to persons under disability in the proviso of the statute of James. This construction alone can account for the absence of legislation recognizing a variance between the provisos of the two statutes and providing a remedy therefor, and completely harmonizes the language of the two provisos. It is not only a natural construction, but it is the only construction upon which the two provisos can stand or could ever have stood together.

And the doctrine the defendant here contends for is the doctrine of this court as held in McClung *vs.* Ross, 5 Wheaton, 116, and in Henderson *vs.* Griffin, 5 Peters, 158.

If this reasoning is correct it follows that the refusal of the court below to charge as requested in the fourth, tenth, and eleventh requests, and refusal to modify the charge already given, were correct; and it is therefore respectfully submitted that these exceptions must be overruled.

But while the defendant has thus shown that the court below did not err in its construction of the proviso of the statute, he insists that he is not even dependent on that construction. The record shows that there was evidence, uncontradicted and unimpeached, tending to prove that his ancestors in title as early as 1826 — six years before the discoverture of Abigail Fuller in 1832 — while the land in controversy was unenclosed, wild, and vacant woodland, were in the habit, "under claim of title in themselves to the land in dispute, of cutting wood thereon openly, in the day-time and in sight of witnesses, for family uses and for the manufacture of baskets, in which business some of the Fullers were engaged, and of carting it off from the land to their houses, under such claim of title, openly, through the village streets, in the day-time and in the presence and sight of witnesses, sometimes with teams, sometimes in wheelbarrows, and sometimes on their

backs." (Record, fol. 51.) The defendant, therefore, claims that he has no need of the benefit of the proviso of the statute. Neither he nor his ancestors or privies in title were bound to enter, or exercise acts of ownership on the land, or take possession, prior to 1832, or during the coverture of Abigail Fuller. The record certainly discloses no evidence showing or tending to show possession, of the character called for by the statute, on the part of the plaintiffs or their ancestors or privies in title, prior to 1829—or anything which can be construed into an act of ownership on the land except in the testimony of a single witness who swore that he cut some wood on the land for Jerahmael Jenks, ancestor in title of plaintiffs, who died in 1821. There was, therefore, no possession on the part of the plaintiffs' ancestors or privies in title, during the coverture of Abigail Fuller to interrupt; but if there was, the defendant's ancestors in title certainly interrupted it legally under the statute; and two juries have found on the evidence that the plaintiffs in error, by themselves, or ancestors, or privies in title, have never been in the possession described in the statute of the premises in dispute for any twenty years.

Record, fol. 7.

X.

Fifth Exception to Refusal to Charge.

It is found at folio 68 of the record.

The defendant in error has admitted from the beginning, nay, the bringing the suit itself admits that the defendants (plaintiffs in error) claim a right to the land, but if the evidence was material and of any importance it would have been manifestly improper for the court to have told the jury that it was "powerful evidence," or, at all events, the giving or the

refusal to express such an opinion is not ground for reversal of judgment.

Hamet *vs.* Dundass, 4 Pa. St. 178.

XI.

Sixth Exception to Refusal to Charge.

It is found at fol. 68, and in substance is, that payment of taxes by Stephen Jenks upon the land in question from the year 1770 until his death, is powerful evidence of his claim of right to the land.

This was refused, and rightly refused.

1st. There was no evidence that Stephen Jenks paid any taxes upon this land. The tax-lists showed that he paid taxes in Smithfield during a portion of the time between 1770 and his death, but not all the time; for instance, there was no evidence that he paid any taxes in that town, or that he was taxed in that town in the years 1771, 1776, 1780, 1781, 1788, 1789, 1790, 1792, 1798, 1799, 1800, (fol. 49). That is, he was not taxed during eleven of the thirty-one years covered by the period mentioned in the request; and, further, there was no evidence that he was taxed for *land* in Smithfield during many of the other ~~eighteen~~ years; and, further, it was in evidence that he was the owner of other land in said town to which alone the tax-lists may have had reference.

Record, fols. 49-50.

2d. If the evidence as stated in the request to charge had been put before the jury, which we deny, it would have been improper for the court to have instructed them that such evidence was powerful evidence of his claim of right to the land, and its refusal to express such opinion is no ground for reversal; and *first*, for the reason that the jury are the sole and proper judges of the weight of the evidence, and secondly,

under the law in Rhode Island at that time land was taxed to the owner or *occupier* of the land (fols. 68 and 69). *Non constat* Stephen Jenks may have been nothing but a lessee or tenant, not claiming to own it, or he may have been taxed as the owner of Ezekiel Fuller's life estate as it appears that he, Ezekiel, had, prior to 1761, sold his interest in the land to some one. (Record, fol. 50.)

3d. In the absence of any evidence of possession of the land by Stephen Jenks, the manner in which he claimed it is entirely immaterial.

XII.

Seventh Exception to Refusal to Charge.

This request is found at fol. 68, and is in substance that if the jury find that the land in question had never been assessed to any of the Fullers since 1768, and that no one of them had ever paid taxes upon it, it was evidence that they had no rightful claim to it which the jury had the right to consider.

There was no evidence, it is true, that the Fullers had been assessed or paid taxes upon this land during the period specified (fol. 50), but inasmuch as land was by law taxed to the one occupying it, and as Ezekiel Fuller's life estate was still in existence and held by some one, it would until his death in 1800 have been rightly taxed to the one who held that estate if he occupied the land as he had the right to do.

The mere fact, therefore, that there was no evidence in the case going to show that the Fullers were actually assessed and paid taxes on this land is very remote upon the right of Abigail Fuller's heirs, but such as it was, it was laid before the jury, and together with other evidence, was considered by them under a proper direction of the court. (Record, fols. 58 to 61).

If the court had charged as requested, singling out and calling this particular circumstance to the minds of the jury, it would have had a tendency to mislead them into giving undue weight to it. The fact was in evidence before them and they were properly directed to give and did give such weight to it as they saw fit.

We submit that the jury were properly and sufficiently charged respecting the evidence of the Fullers' right during the period specified, and that the plaintiffs' case was in no degree prejudiced by the refusal to charge as requested.

XIII.

Eighth Exception to Refusal to Charge.

This exception is found at fol. 68.

The first part of the request in relation to the parties to whom, by law, land was taxed, had already been in substance given by the court to the jury. (Record, fol. 59).

The last part of the request, as to the fact of plaintiff's ancestors paying taxes since 1805 being evidence of possession and ownership was properly refused.

The court properly charged as to what facts it was necessary to prove in order to constitute adverse possession. (Fols. 69 and 70.)

The evidence was before the jury for their consideration, and the court charged upon it correctly, that the payment of taxes alone did not show adverse possession.

Taylor's Devisees *vs.* Burnside, 1 Grattan, 211.
Jackson *vs.* Myers, 3 Johns. 383, 392, 393.
Ewing *vs.* Burnet, 1 McLean, 267.
Sorber *vs.* Willing, 10 Watts, 142.
Hockenbury *vs.* Snyder, 2 Watts & Serg. 252.
Cornelius *vs.* Giberson, 1 Dutch. 1.
Reed *vs.* Field, 15 Vt. 676.
Little *vs.* Megquier, 2 Greenleaf, 178.

But if the payment of taxes, as stated in the request, was evidence of *possession*, it could not be evidence of ownership as against Abigail Fuller or her heirs, because her coverture continued until 1832, and she was protected by the proviso of the statute for ten years thereafter, that is, until 1842, (Record fol. 30), and the title of her heirs was kept alive from the time of her death, which occurred in 1835, down to the time of bringing this suit by repeated legal entries upon the land from time to time, thus interrupting all adverse possession, as was found by the jury. (Record, fols. 47 and 74 and 75.)

XIV.

Ninth Exception to Refusal to Charge.

The ninth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at folio 70 of the record, and is as follows, viz.:

"That if the jury find that the defendants (plaintiffs in error) and those from whom they derive their title to the land in question, have for any twenty years after the death of Benjamin Fuller, in 1832, and prior to the commencement of this suit, been in the uninterrupted, quiet, peaceable, and actual seizin and possession of the lands in question, for, and during such twenty years, claiming the same as their sole and rightful estate in fee simple in the lands which could be only avoided by actual possession by the plaintiff (defendant in error) or those under whom he claims for a subsequent term of twenty years, and there being no evidence or claim on his part of any such subsequent possession, the defendants (plaintiffs in error), would be entitled to a verdict."

In discussing this exception, the defendant in error, at the outset, concedes the law to be as stated in the proposed charge. But he claims that the refusal to charge as requested is not error or ground for reversing the judgment.

1. The court had already clearly stated the law embodied in the request as follows, viz.:

"Then, gentlemen, you will come to the consideration of the statute of possessions. This is the second defense which the defendants (plaintiffs in error) offered here; and, gentlemen, I will read to you two sections of the statute of possessions of the State of Rhode Island:

"'GENERAL STATUTES. CHAP. 164; SEC. 2. Where any person or persons, or others from whom he or they derive their title, either by themselves, tenants or lessees, shall have been for the space of twenty years in the uninterrupted, quiet, peaceable, and actual seizin and possession of any lands, tenements or hereditaments, for and during the said time, claiming the same as his, her or their proper, sole and rightful estate in fee simple, such actual seizin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs and assigns forever; and any plaintiff suing for the recovery of any such lands may rely upon such possession as conclusive title thereto; and this chapter being pleaded in bar to any action that shall be brought for such lands, tenements or hereditaments, and such actual seizin and possession being duly proved, shall be allowed to be good, valid, and effectual in law, for barring such action.

"'SECTION 3. Nothing in this chapter shall be construed, deemed, or taken to extend to prejudice the rights and claims of persons under age, *non compos mentis*, *femes-covert*, or those imprisoned, or those beyond the limits of the United States; they bringing their suit therefor within the space of ten years next after such impediment is removed, or to bar any person or persons having any estate in reversion, or remainder, expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life or lives; such person or persons pursuing his

or their title by due course of law within ten years after his or their right of action shall accrue.

"'Gen. Statutes of Rhode Island (1872), 353.'

"Gentlemen, you see there what the statute of possessions in this state is, and it was substantially the same, as is admitted by both sides, during the period covered by this case — that is, gentlemen, under the statute of possessions of Rhode Island, a party who enters into the uninterrupted, quiet, peaceable, and actual seizin and possession of lands, claiming the same as their proper, sole, and rightful estate in fee simple for a period of twenty years, acquires an absolute title to the estate. . . . That is, gentlemen, the law is this: Twenty years' uninterrupted, quiet, peaceable, and actual seizin and possession, claiming the same, gives a good title to the land."

Record, fol. 63.

And where the law has already been clearly given to the jury the refusal to repeat in substance is not error.

Laber *vs.* Cooper, 7 Wall. 566.

2. There is no basis of fact disclosed in the record which could make the proposed charge applicable or justifiable. The record fails to show that at the trial there was evidence showing or tending to show, such a possession as the statute calls for.

a. The plaintiffs in error until the completion of the twenty years of uninterrupted, quiet, peaceable, and actual seizin and possession under claim of right in fee simple, are, as to the defendant, wrong-doers in the eye of the law since they are aiming to secure to themselves the land of the defendant without compensation. Taylor *vs.* Burnside, 1 Grattan, 190–194; Peabody *vs.* Hewitt, 52 Maine, 44; Peters *vs.* Foss, 5

Greenleaf, 184. For this reason the statute requires of them due proof of such actual seizin and possession with all the qualities and for the entire term of twenty years, specified in the statute.

Gen. Statutes, Chap. 164, §2.

b. The statute of possessions and the statute of 21 James I., Chap. 16, are held to be *in pari materia* and so are to be construed together, Clarke *vs.* Cross, 2 R. I. 448–449; and it is certain that the qualities and duration of the possession named in, and which give title or defense under the statute of possessions are the same which are regarded as essential to make title against the legal owner under the statute of James; and it is universally held that a possession having all these qualities for the twenty years, must be shown by clear and positive proof and can never be presumed.

Doe dem Hammond *et al. vs.* Cook *et al.* 6 Bingham, 174, 178, 180.
Hurst *vs.* McNeil, C. C. Rep. 80, 81.
Ricord *vs.* Williams, 7 Wheaton, 108.
Taylor *vs.* Burnsides, 1 Grattan, 193, 194.

/ Wash.

2.2. But not only does the record fail to show that there was ever such a possession or evidence tending to show that there was ever such a possession by the plaintiffs in error, but it clearly and unmistakably shows that there has been no such possession since the death of Benjamin Fuller in 1832, as appears from the following quotations therefrom:

"It appeared in evidence that the land in question had never been enclosed on the line of the turnpike. The plaintiff (defendant in error) introduced several witnesses tending to prove that there was no fence or wall, or any indications of any fence or wall anywhere on or around the lot in controversy until 1838, when a fence was put up on the west side by Welcome A. Phillips, at his own expense. The defendants (plaintiffs in error) introduced the testimony of one witness, Daniel S. Dexter, whose evidence tended to prove that on the southerly

line of the land there was once a fence, running from the turnpike westerly over the hill to the opposite side of the ledge, and that the last of this fence disappeared in 1835; also showing that on the westerly line of the land an adjoining owner (Welcome A. Phillips, above named,) in 1838 erected a fence at his own expense, and without exaction thereof from the defendants' (plaintiffs' in error) ancestors in title; and that about 1847 there was a sort of tree-fence across several pathways on the northerly side of the land, but there was no other fence on this land until 1857, when a purchaser of adjoining land erected one there. [Fols. 46, 47.]

"It also appeared in evidence that the land in question had never been put to cultivation; that prior to 1858 it was covered with woods, except as cut from time to time, as hereinafter stated, and had upon it an extensive ledge and hill of rock running across its centre from north to south, covered with wood, except at the points worked; that this ledge was opened by the defendants' (plaintiffs' in error) ancestors in title as early, at least, as 1835, one witness swearing that he saw stone taken from there in 1830, while another swore that the ledge had not been opened in 1833; that in 1845 or 1846 large quantities of stone were quarried and sold to the railroad companies from this lot, by the defendants' (plaintiffs' in error) ancestors in title, and from time to time, down to the time of the trial, with longer or shorter intervals, never of more than a year or two, the ledge had been worked, or the refuse or chip-stone had been removed therefrom by the defendants' (plaintiffs' in error) ancestors in title, their tenants and lessees, more or less extensively; and there was no evidence that any other persons had ever worked the ledge, or taken stone off the lot. [Fols. 47, 48.]

"And it was in evidence that Capt. N. G. B. Dexter, the father of the defendants (plaintiffs in error), put up painted signs on the land in dispute, which read: 'All persons are forbidden taking wood and stone from this ledge.' N. G. B. Dexter. [Fol. 48.]

"It was also in evidence that a lessee of the father of the

defendants (plaintiffs in error), in or about 1860 or 1861, built a rough barn and tool shed on the land in question, near this ledge, for his use in quarrying from the same, such structures being in full view from Broad Street, formerly the turnpike; and such lessee on the land there near these structures excavated a well, from which he obtained water for the necessary purposes of his business. The barn, with lofts for hay, was of sufficient capacity to accommodate, and did accommodate, six or eight horses, or more. This barn, with some additions made to it afterwards, remained on the land until sometime in 1869, when the same was removed by the lessee. [Fol. 48.]

"And it was in evidence that for more than sixty years next prior to the time of trial, neither the defendants (plaintiffs in error) nor their ancestors in title had lived within three-quarters of a mile of the land in dispute. [Fol. 48.]

"There was no evidence showing, or tending to show, that the land in dispute was ever occupied or possessed by the defendants (plaintiffs in error) or their privies in title in any other way than as hereinbefore and hereinafter stated. [Fol. 49.]

"There was also evidence tending to prove that the defendants' (plaintiffs' in error) ancestors in title had cut wood upon the land for their own family use, more or less every year, from about the year 1829 down to 1857, when it was in proof that the father of the defendants (plaintiffs in error), Capt. Nathaniel G. B. Dexter, from whom they derive their title, then cut and took to his own use all the wood of value then remaining on the lot; and there was also evidence from one witness who testified that he cut wood on this land for Jerahmael Jenks, who died in June, 1821. [Fol. 51.]

"But there was also evidence tending to prove that the plaintiffs' (defendants' in error) ancestors and privies in title, members of the Fuller family, between 1826 and 1858, and at varying intervals, were in the habit, under claim of title in themselves to the land in dispute, of cutting wood thereon, openly in the day-time, and in the sight of witnesses, for

family uses, and for the manufacture of baskets in which business some of the Fullers were engaged, and of carting it off from the land to their houses, under such claim of title, openly, through the village streets, in the day-time, sometimes with teams, sometimes in wheel-barrows, and sometimes on their backs; and it was also in evidence, that on three occasions, in contemplation of taking legal proceedings for establishing their title to said land, some of the Fullers went around and upon said land, and pointed out the boundaries of this land and claimed to own it, to the parties who were intending to assist them in such contemplated proceedings, to wit, once in the year 1840, once in the year 1844, and once in the year 1856. [Folios 51, 52.]

"Q. Did you ever know of the Fullers cutting wood from this place?

"ANS. Never but once, and I only saw one of them then. This was some twenty odd years ago. I was living in my house on Central Street at that time. It must have been nearly thirty years ago I saw Benjamin Fuller, as I afterwards ascertained it to be. I was going to Valley Falls, on what is now Broad Street. I met Capt. Nathaniel G. B. Dexter, just this side of this lot, and I spoke to him, and he said 'I don't know what I shall do with these Fullers.' He said they kept coming and carrying off his wood off this lot, and Captain Dexter left me and I proceeded on towards Valley Falls, and the man above I saw cutting wood had just come on to the road with a wheelbarrow full of wood off this lot. I asked him, Benjamin Fuller, if he and Captain Dexter had been having a duel up in the woods. He said 'No, he had been cutting wood off his own land and that Captain Dexter had sworn pretty hard at him, and that he had sworn as hard at him.' I then passed along."

Dep. Daniel Pearce, folios 53, 54.

"Captain Dexter, you all know, dealt in thread and yarn all those days, and had a place upon Pleasant Street, I think they

call it, in Pawtucket. I used to go there frequently to get some yarn for my daughters, when they were away from school, to knit, crochet, and one thing and another. One time, I remember, I went down, and never but once caught the captain in. This time the captain was in. I got my orders and started to go out, and the captain then says to me, 'Mr. Phillips, do you see the Fullers on my land there lately? Says I, 'Occasionally I see them on there.' He stopped a minute, the captain did, and looked in the fire, and says: 'There, I don't know what I shall do with those Fullers. I don't know what I shall do with them.' Says I, 'I will tell you what I would do if I was in your place. You have enough, captain, and to spare, and they are poor, old Uncle Ben in particular; and I never saw them carry off any wood there but brush-wood — wood to burn — wood that you wouldn't pay a man for carrying off,' and I left the captain in that shape. He did not make any answer to it whatever."

Dep. W. A. Phillips, fol. 55.

From these quotations from the record which include the whole evidence as to the adverse possession of the defendant, it is manifest that there could have been no possession of the character or duration required to satisfy the statute within the period mentioned in the proposed charge.

Since, therefore, the court had already clearly given to the jury the substance of the proposed charge; and since the record not only does not show twenty years of such possession as satisfies the statute, or present any basis of fact which could make the proposed charge applicable or justifiable, but clearly and unmistakably shows that there never was such possession during the period mentioned in the proposed charge, the court could not err in refusing the request, and it is submitted that the exception must be overruled.

XV.

Twelfth and Fifteenth Exceptions to Refusal to Charge.

Counsel for the plaintiffs in error requested the court below to charge the jury, as follows, viz.:

"To interrupt possession under a claim of title in fee simple under the statute of possessions of this state, and to prevent such possession from ripening into title at the end of twenty years, there must be such acts upon the land itself within such twenty years, as practically to interfere with the actual possession and enjoyment of the land by the occupant," (Twelfth request, Record, fol. 72); and, also,

"Merely occasionally going upon the land in the absence of the party in the actual possession and enjoyment of it, and cutting wood of little value, if unaccompanied by any actual disturbance of the enjoyment of the land by the occupant for all practical purposes, will not, under the statute, work any interruption of the occupant's possession to stay the running of the statute." (Fifteenth request, Record, fol. 78.)

But the court refused each of these requests and the plaintiffs in error excepted in each case. It is clear that the *pivotal* question raised by each of these exceptions is as to what is sufficient to interrupt and stay the running of the statute of possessions; and, therefore, the two exceptions may properly be considered together.

The refusal of the court below to make either of the proposed charges is not error, or ground for reversing the judgment.

1. Because both of the proposed charges are based on the erroneous assumption that the case made below by the plaintiffs in error shows a possession on their part which in any sense answers to the possession described in the statute.

The record, so far from showing such a possession, shows that neither the plaintiffs in error themselves nor their ancestors in title lived within three-quarters of a mile of the land throughout the memory of the oldest living witness, (fol. 48); that they never fenced or otherwise enclosed it (fols. 46, 47); that they never put it to cultivation, (fols. 47, 48); and that they never occupied it in any other manner than as follows, (fol. 49) viz.: As early as 1835 they opened the ledge; "in 1845 or 1846 large quantities of stone were quarried and sold to the railroad companies. . . . by the defendants' (plaintiffs' in error) ancestors in title, and from that time down to the time of the trial, with longer or shorter intervals, never of more than a year or two, the ledge had been worked or the refuse or chip-stone had been removed therefrom by the defendants' (plaintiffs' in error) ancestors in title, their tenants and lessees more or less extensively," (fols. 47, 48),—their tenant from 1860 or 1861 to 1869, having a barn and tool-house near the opening of the ledge, and digging a well for his uses while working the ledge (fol. 48). Until 1858, within sixteen years of the bringing of this suit, the land was heavily wooded (fol. 47); and Captain Dexter, the father and ancestor in title of the plaintiffs in error, from 1829 to that date, when he cut off nearly all the standing wood, was in the habit, doubtless under claim of right, of going thereon occasionally to get all his fire wood for family uses (fol. 51); a habit, however, which, it must be borne in mind, he or any of the plaintiffs' ancestors in title did not enjoy alone, for the whole Fuller tribe had a like habit, under like claim of right, of going there for the same purpose of getting fire wood for family uses and for manufacturing baskets — a business in which some of the Fullers were engaged — and cutting and carrying it off, covering the whole period, and extending back three years earlier, to 1826 (fols. 51, 52); and if living witnesses could be had, would doubtless be shown to extend back to the death of Ezekiel Fuller in 1800, when they first came into the right to so cut and carry away wood from the prem-

ises; for every presumption is to be made in favor of the legal title.

Angell on Limitations, Chap. XXXI., §6.

So far, therefore, from showing on the part of the plaintiffs in error and their ancestors in title, a possession and seizin for twenty years, uninterrupted, quiet, peaceable, and actual, under claim of right in fee simple, which can, under the statute, alone give title, the record shows merely, occasional entries accompanied by acts under claim of ownership, or brief occupations of small portions of the land, or at most a mixed possession with the defendant, wherein the seizin which can be in but one of two parties claiming adversely to each other, must be in the defendant in error who has the legal title.

Anonymous, 1 Salk. 246.
Barr *vs.* Gratz, 4 Wheat. 213.
Smith *vs.* Burtis, 6 Johns. 218.
Codman *vs.* Winslow, 10 Mass. 146, 151.
Brimmer *vs.* Proprietors of Long Wharf, 5 Pick. 131, 135, 136.

2. Because neither of the proposed charges states the law of interruptions correctly.

a. They are based upon the theory that pending the running of the statute the plaintiffs and defendant here have equal merit and are equally entitled, as against each other, to the consideration of the court. They overlook the fact that the defendant is the true owner, and the plaintiffs, until the twenty years have passed, are mere wrong-doers and have no rights whatever against the defendant which the law is solicitous or even able to protect. If both parties were on the same footing and were claiming property by right of possession only, the case would be different and the proposed charges proper. But in the case presented by the record the law knows only one side and is anxious to aid that side only.

b. An interruption of the plaintiffs' possession under the statute, unless the statute itself or some other legislation has otherwise provided, must have the same qualities as an interruption under the statute of James, since the two statutes having the same object are *in pari materia*, and their operation and terms must be subject to the same construction. Clarke *vs.* Cross, 2 R. I. 448. Neither the statute of possessions itself nor any other act of legislation has ever defined an interruption under the statute, and no court has ever construed the interruption contemplated by the statute of possessions to be different from that contemplated by the statute of James.

But it has been over and over again decided that an entry open, visible, and under claim of ownership and accompanied by the exercise of acts of ownership works such interruption.

Coke on Littleton, 245 b.
Henderson *vs.* Griffin, 5 Peters, 158.
Holtzapple *vs.* Phillburn, 4 Wash. C. C. 368.
O'Hara *vs.* Richardson, 46 Penn St. 390.
Altemas *vs.* Campbell, 9 Watts, 28.
Taylor *vs.* Burnside, 1 Grattan, 212, 203, 204.
Burrows *vs.* Gallup, 32 Conn. 499.
Peabody *vs.* Hewitt, 52 Maine, 46, 44, 52.
Plowden, 92, 93.
Stearn's Real Actions, 42.
Means *vs.* Welles, 12 Metcalf, 356.
Brickett *vs.* Spofford, 14 Gray. 518, 519.
Rogers *vs.* Benlow, 10 Sergt. & Rawle, 306.
Robinson *vs.* Swett, 3 Greenleaf, 316, 324.
Jackson *vs.* Haviland, 13 Johns. N. Y. 235.

And the adverse claimant, pending even a continuous and actual occupation with a view to acquiring title under the statute, has no such right as would compel the real owner to condescend to call at the residence or place of business of such adverse claimant three-quarters of a mile away to notify him of an intended entry upon his own land.

3 ~~4.~~ Because the court had already clearly and correctly stated the law of interruptions as follows, viz.:

"Now, gentlemen, what is a legal entry, a legal entry by a person who has been disseized or put out of possession of property to which he was originally legally entitled or who has a record title; that is, what would constitute a legal entry of the Fullers in this case on the hypothesis that they had the legal title, a title which originally came to them from Abigail Fuller? What would constitute a legal entry after 1832? Well, gentlemen, a legal entry would be where the rightful party goes upon the land visibly, openly, under a claim of right, and exercises acts of ownership upon the land such as cutting wood, etc." (Record, fol. 77.) Therefore, gentlemen, after 1832, you will consider upon the evidence submitted whether Abigail Fuller, or the heirs of Abigail Fuller, or any one of them, made a legal entry upon the premises. . . . And you will remember that it must be an open, visible entry under a claim of ownership; not a secret entry, not going over there occasionally to get a little wood and not with the intent of claiming, but going upon the land under a claim of ownership and getting wood and carrying it off. (Record, fol. 74.) And, gentlemen, if you should find upon the testimony that between 1832 and 1842 — being protected by coverture until 1832 — provided, of course, you find that Benjamin Fuller died at that time and that she became a widow then; if between 1832 and 1842 legal entries were made upon this land by Abigail Fuller, by herself or by one of the heirs as representing the rest, then that would stop the running of the statute for the period of twenty years. (Record, fol. 75.) . . . If you find that a legal entry was made between 1832 and 1842 and that there were subsequent legal entries made upon the land down to within a period of twenty years from the beginning of this suit, that would preserve the rights of the plaintiff (defendant in error) until the time of bringing of this suit. (Record, fol. 75.)

"Therefore, gentlemen, if you should find that there was a pos-

session such as I have described prior to 1779, by the defendants (plaintiffs in error), Abigail Fuller's right would expire in 1810. If you find that there was no such possession previous to that date, then whatever possession there may have been after 1779, down to 1832, still Abigial Fuller's right would not expire until ten years after 1832; and if you shall find that within that ten years entries were made and at subsequent periods of twenty years, down to the beginning of this suit, that would keep alive the right of the plaintiffs." (Record, folio 75.)

Since, therefore, the proposed charges are based on the erroneous assumption that the case made below by the plaintiffs in error shows a possession on their part, which answers to the possession described in the statute, and neither of the proposed charges states the law correctly, and the court had already clearly and correctly stated the law of interruptions, there was no error in either of the refusals, and the two exceptions, it is respectfully submitted, must be overruled.

XVI.

Thirteenth Exception to Refusal to Charge.

The thirteenth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at fol. 77 of the record, and is as follows, viz.:

"Mere claims of ownership, or title off the land itself, and not accompanying any act upon the land, are not evidence of interruption of the possession, and the jury will not be justified in so considering."

The court did not err in so refusing.

1. Because the court had already substantially made the proposed charge, as follows. viz.:

"Neither, gentlemen, have the claims which the Fullers have made generally in the community to this property, any bearing upon the question of whether they made a legal entry on to this property after 1832. Such declarations, gentlemen, as they made at the time that the acts were committed, or about the time that the acts were committed — such declarations, as they made going to show the intent with which they entered, are admissible, but the general claim in the community . . . should, in your minds, have no bearing at all upon the question of the assertion of their rights under the statute of possessions or of limitations, only in this view, that the expressions that they made at the time of the acts of interruption were committed, or about the time they were committed, are admissible as going to show the intent with which it was done, and their claim to the property."

(Record, fol. 76, 77.)

2. The record disclosed no possession, of the character required by the statute, to interrupt — showing, as we have already seen, only occasional entries accompanied by acts of ownership or temporary occupations of but small portions of the land down to 1858, or, at most, a constructive mixed possession shared alike by both parties, and therefore showing no facts to which the proposed charge could apply.

Record, fols. 46, 47, 48, 51, 52.

XVII.

Fourteenth Exception to Refusal to Charge.

The fourteenth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at fol. 78 of the record, and is as follows, viz.:

"No such claims of right or title to the land made after

1825 are any evidence whatever to rebut the presumption of a lost deed prior to 1768."

The court did not err in so refusing to charge,

1. Because the proposed charge is, in the form offered, vague and meaningless and could be of no aid to the jury, if given.

2. Because if we assume that it relates to claims off the premises in dispute and unconnected with any entry or act of ownership, and so most favorably to the plaintiffs, still it is not the law. Every such claim offered in evidence is a link in a continuous chain of claims made by the Fuller family for two or three generations in the immediate vicinity of the land in dispute, reaching back as far as the memory of the oldest living witness extends, a fact which negatives the plaintiffs' claim of acquiescence in their possession as a basis for the presumption of a lost deed. Indeed, the fact of such a continuous chain of claims by the defendants in error furnishes strong ground for the presumption that they extend back to the time of the original Abigail Fuller and her immediate descendants, and so effectually rebut the presumption that Abigail Fuller ever parted with her land by deed since lost. It is a firmly settled rule of law that every presumption is to be made in favor of the legal title, and especially against a title resting wholly on presumption.

Hammond *et al. vs.* Cook *et al.*, 6 Bingham, 174, 178–180.
Erwin *vs.* Moore, 6 Cowen, 706, 721–725.
Stillman & Co. *vs.* White Rock Manuf'g Co. *et al.*, 5 Woodbury & Minot, 526.
Hurst *vs.* McNeil, 1 Wash. C. C. R. 80, 81.
Taylor *vs.* Burnside, 1 Grattan, 193, 194.

XVIII.

Sixteenth Exception to Refusal to Charge.

The sixteenth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at fol. 78 of the record, and is as follows, viz.:

"That so far from claims of right or title made off the land and not accompanying any act upon the land being evidence of interruptions of possession, they may be considered by the jury as evidence of such possession by the defendants (plaintiffs in error), and those from whom they derive their title, as they tend to show knowledge and recognition by the plaintiff (defendant in error), and those under whom he claims, that the lands were actually held in possession by somebody else adversely to them."

The court did not err in refusing to so charge,

1. Because the proposed charge assumes what is untrue, to wit, that any such claims were offered as evidence of interruptions of possession, when they were offered solely as evidence to rebut the presumption of a lost deed.

Record, fol. 53.

2. Because the proposed charge is not a correct statement of the law applicable to this case. If given, the jury would be authorized to presume an adverse possession from any claim of right or title off the land and not accompanying any act upon the land, whether made with or without allusion to the possession or occupancy of the land, or made with words either admitting or denying such possession. Whereas the law exacts that an adverse possession, like the plaintiffs' in error, shall be proved by clear and positive proof, and shall not be presumed.

Gen. Statutes, Chap. 164, §21.
Taylor *vs.* Burnside, 1 Grattan, 193, 194.

Hammond *et al. vs.* Cook, *et al.* 6 Bingham, 174, 178–180.
Hurst *vs.* McNeil, 1 Wash. C. C. Rep. 80, 81.
Ricord *vs.* Williams, 7 Wheat. 108.

XIX.

Seventeenth Exception to Refusal to Charge.

This exception is found at fol. 79, and was considered under paragraph II., subdivision B.

XX.

Eighteenth Exception to Refusal to Charge.

This exception is found at fol. 79, and was considered under paragraph II., subdivision B.

XXI.

Nineteenth Exception to Refusal to Charge.

The nineteenth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at folio 80 of the record, and is as follows, viz.:

"Public officers are presumed to have done their full duty, particularly in transactions that occurred over a hundred years ago. The jury are, therefore, entitled to consider whether the town committee, who in and about the year 1761 or 1762, were searching for Fuller lands, from which to support the children, would not have found and reported the land in question as a part of the estate to be sold for the support

of the children of Ezekiel Fuller, or his children claiming under his deceased wife, had they any rightful estate in it."

The court did not err in refusing to so charge,

1. Because, if it were the law that "public officers were presumed to have done their full duty — particularly in transactions that occurred over a hundred years ago," the plaintiffs in error had already had the full advantage of the principle, in being allowed to put before the jury the entire record of those proceedings for the purpose specified in the charge, and in the charge of the court relating thereto, which was as follows, viz.:

"And, gentlemen,"— in enumerating the claims and evidence supporting the same made by the plaintiffs in error to sustain the presumption of a lost deed — "they (the plaintiffs in error) further say, going to show that there may have been an early deed, that the town council proceedings of the town of Smithfield is evidence going to show that at that time Abigail Fuller or her children had no other land in the town of Smithfield except the lot in question which was sold under the act of the General Assembly — the six-acre lot. Gentlemen, this is the evidence which the defendants (plaintiffs in error) introduce — part of it. I don't pretend to state the whole or in detail, going to show you that you have a right to presume upon the testimony that there was a grant from Abigail Fuller to either Francis or Jeremiah Fuller." (Record, fol. 59.) . . . "Well, gentlemen, these are some of the leading facts upon one side or upon the other, which you will weigh, and such other testimony bearing upon this question, either introduced upon the side of the plaintiffs or the defendants upon this question of a grant or lost deed; and, gentlemen, you will determine upon that evidence whether there was an early deed from Abigail Fuller to either Francis or Jeremiah Richardson." . . . "Then you will consider the question of the presumption of a deed, and whether you can,

under the circumstances, presume a deed, or not upon the evidence as it is submitted." (Record, fol. 61.)

2. Because, if it were the law that "public officers are presumed to have done their full duty — particularly in transactions that occurred over a hundred years ago," and if the plaintiffs here had not had the full benefit of the proposed charge, in the admission of all the evidence offered on the subject and in the charge already given, the presumption is effectually rebutted in this instance by the record evidence that the public officers did not do their duty.

By vote of Smithfield Town Council, Sept. 15, 1767, Stephen Whipple, town treasurer, was directed to sell all the land in Smithfield of which the fee was in Ezekiel Fuller, Sr., (Record, fol. 26,) and under color of this authority he proceeds to sell land of Ezekiel Fuller, Jr., of which Ezekiel, Sr., never had the fee. (Record, fol. 29.) By vote of said town council, in September, 1761, Jeremiah Mowry is appointed a committee to search after and secure land belonging generally to the Fuller family, for the support of the two youngest of the children of Ezekiel Fuller, Sr. (Record, fol. 23.) By vote of said town council, March, 1762, Daniel Mowry, Jr., is appointed a committee to obtain authority of General Assembly to dispose of land of Ezekiel Fuller, Sr., for benefit of said two children, then chargeable to the town, (Record, fol. 24); and in 1766 said Daniel assumes to execute his trust by getting or attempting to get authority from the General Assembly to sell land of Ezekiel Fuller's deceased wife for the same purpose. (Record, fol. 27.)

3. Because, if it were the law that "public officers are presumed to have done their full duty — particularly in transactions that occurred over a hundred years ago," and if the plaintiffs here had not had the full benefit of the proposed charge in the admission of all the evidence offered by them on the subject, and in the charge already given, the charge

proposed ought not to have been given, since it has no application to the facts in the case.

Ezekiel Fuller, the father of Abigail and Francis, the children named in the town council proceedings, (Record, fols. 22–26,) and his property, were alone liable for the support of said children. (1 Parsons on Contracts, 308, and cases there cited.) The land in controversy did not belong to said Ezekiel Fuller. It had belonged to his deceased wife, Abigail Fuller, in her life-time, but, upon her decease, prior to the institution of said proceedings, had descended to and vested in her eldest son, Ezekiel Fuller, Jr., (Record, fol. 30,) by the law of primogeniture then in force in the colony as a part of the common law. (Appendix p. 3.) There is no evidence that Ezekeil Fuller, Sr., ever had any interest in the land except as tenant by the curtesy, and he had already parted with that. (Record, fol. 50.)

The land, therefore, could not legally come within the control, cognizance, or authority of the town council or its committee, or even of the General Assembly, since, having already passed by law to and vested in Ezekiel Fuller, Jr., it could not be devested and appropriated to the support of the children named, even by act of the General Assembly, since such act would be retroactive and beyond its powers, and would deprive the owner of his property "without due process of law."

The powers of legislation conferred on the General Assembly were the following: "And from time to time to make, ordain, constitute, or repeal such laws, statutes, orders, and ordinances . . . as to them shall seem meet for the good and welfare of the said company, and for the government and ordering of the lands and hereditaments, . . . and of the people that do, or at any time hereafter, shall inhabit or be within the same; so as such laws, ordinances, and constitutions so made be not contrary and repugnant unto but as near as may be agreeable to the laws of this our realm of England."

Charter of Charles II., in force till 1842. App. p. 1.

XXII.

Twentieth Exception to Refusal to Charge.

The twentieth request to charge made by the plaintiffs in error, to the refusal of which they except, is found at fol. 80 of the record, and is as follows, viz.:

"All acts are presumed to have been rightfully and regularly done, and this applies particularly to transactions of ancient date, and applies to deeds made so many years ago that no living testimony can be adduced respecting them, and the jury may presume that the deed was rightfully made, and the possession rightfully taken and held under it, particularly if they find that the subsequent possession and dealings with the land within that time capable of existing proof, and the payment of taxes upon the land had been consistent with the deed."

The court did not err in so refusing to charge,

1. Because the general proposition with which the charge begins and the special application of it to ancient deeds is not the law. All acts — recent or ancient — are presumed to be regularly done, *i. e.*, done according to rule or rules under which only they could be done. But there is no such presumption as to the rightfulness of those acts. Only when the actor is shown to have the right, will his act be presumed to be rightfully done.

2. Because the proposed charge if given, would authorize the jury to presume that the deed from Jeremiah Richardson to Stephen Jenks was rightfully made when not only evidence *dehors* the instrument, but the very language of the instrument itself shows that the grantor had no right; and if he had no right to give the deed, it follows that no rightful possession could be taken under it.

a. "They (defendants in error) also claim that what he (Jeremiah Richardson) recites in that deed that this property

had come from his honored grandfather, or words to that effect, also shows that he had no deed, and that his brother had no deed from Abigail Fuller." (Extract from Judge Colt's charge Record, fol. 60); *A fortiori* does the absence of any reference in the deed of Richardson to Jenks to title through his brother or from any one capable of giving it, show that there never was such title.

b. Neither Francis Richardson, who was a minor until Oct. 8, 1763, nor his brother, Jeremiah, the grantor, who was a minor until Sept. 29, 1765, (Record, fol. 45,) could have purchased the property of their aunt, Abigail Fuller, who must have died before the summer of 1761. (Record, fol. 22.)

3. Because there is no evidence of "possession and dealings with the land within the time capable of existing proof," which can take the place of that "uninterrupted, quiet, peaceable, and actual possession, under claim of right in fee simple," from which alone the jury would be justified in presuming the deed a rightful one, or that a rightful possession was taken under it, against the perfect legal title of the defendant; and the charge, if given, could only have the effect of mystifying and involving the issues in the case.

4. Because the court had already admitted all the evidence offered by the plaintiffs in error on the question of presuming a lost deed, and the counsel for the plaintiffs had used every scrap of such evidence for all that it was worth in exhaustive arguments of great length, and the court had instructed the jury that it was within their province to presume a lost deed upon that evidence.

Record, fols. 58–61.

5. Because every presumption is in favor of the legal title of the defendant and against the rightfulness of the Richardson-Jenks deed and of any possession thereunder; since the record shows that the grandfather of Jeremiah, the grantor,

had devised the land to his daughter, Abigail Fuller, aunt of said Jeremiah, and had never revoked it; and the will containing the devise had been established by proper probate; and said Abigail had entered thereon and completed her title (Record, fol. 22); and said Jeremiah Richardson and his brother Francis were both too young to purchase from their aunt before her decease; and her heir-at-law, Ezekiel Fuller, Jr., who was born Jan. 1, 1751, was too young to convey the property before the deed from Jeremiah Richardson to Stephen Jenks (Record, fol. 30); and since there must have been at least two deeds necessary to vest the title in either Francis or Jeremiah Richardson, neither of which has been produced, or shown to have ever existed, and the Richardson-Jenks deed instead of reciting or referring to the loss of either of them, or in any manner referring to the claim of Abigail Fuller to the land, speaks of it as coming to the grantor, Jeremiah Richardson, from his grandfather, Francis Richardson. (Record, fol. 60.)

XXIII.

Twenty-first Exception to Refusal to Charge.

The twenty-first request to charge made by the plaintiffs in error, to the refusal of which they except, is found at fol. 81 of the record, and is as follows, viz.:

"That under the statute of James I., limiting real actions, the right of action of Mrs. Abigail Fuller, Jr., or of her heirs, was barred twenty years at the latest from the time when that right of action first accrued, and that cannot be kept open by successive entries. In other words, if the right of action began in 1832, and the jury should find that she or her heirs did enter after 1832, prior to 1842, the right of action would be barred, at the latest, at the end of twenty years from the latter time, by the statute of James."

The court below did not err in so refusing to charge,

Because it is a settled principle of law and fully recognized in the adjudications under the statute of James that an entry by the legal owner, either before or after removal of a disability mentioned in the proviso, breaks the continuity of the adverse possession, blots out all rights of the adverse occupant, and revests the seizin in the legal owner; and that the adverse party can acquire title against the owner only by reëntry and a new disseizin, and a like possession, uninterrupted by entry, for a full period of twenty years from such reëntry, and can never acquire title except by such possession uninterrupted by entry for the full term of twenty years.

Taylor *vs.* Burnside, 1 Grattan, 204.
Peabody *vs.* Hewett, 52 Maine, p. 44.
Altemas *vs.* Campbell, 9 Watts, 29.

XXIV.

The plaintiffs in error must make out the alleged errors clearly and satisfactorily. Every reasonable intendment should be in favor of the judgment.

Vestris *vs.* Smith, 10 Peters, 161.
Chafee *vs.* Planters Bank, 13 Howard, 183.

XXV.

The plaintiffs in error having failed to make out the alleged errors, or any of them, clearly and satisfactorily, the defendant respectfully submits that all their exceptions should be overruled and the judgment of the court below affirmed.

JAMES C. COLLINS,
ELISHA C. MOWRY,
LIVINGSTON SCOTT,
Attorneys for Defendant in Error.

APPENDIX.

Extract from the Charter of Rhode Island on the subject of the power of the governor and the General Assembly:

"And from time to time to make, ordain, constitute or repeal such laws, statutes, orders and ordinances, forms and ceremonies of Government and magistracy as to them shall seem meet for the good and welfare of the said Company, and for the government and ordering of the lands and hereditaments thereinafter mentioned to be granted, and of the people that do or at any time hereafter shall inhabit or be within the same. So as such laws, ordinances and constitutions so made, be not contrary and repugnant unto, but as near as may, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there."

See page 5 of Charter, Public Laws of Rhode Island, 1730.

LAWS,

Made and past by the *General Assembly* of His Majesty's Colony of *Rhode Island*, and *Providence-Plantations*, Begun and Held at *Newport*, the first day of *March*, 1663.

. . . . . .

. . . . . .

An Act for the Probate of Wills, and Granting of Administrations.

BE IT ENACTED *By the General Assembly, and by the Authority of the same*, That the Power of proving of Wills, and granting of Administrations of the Personal Estate of persons deceased, shall be in the respective Town Councils of this Colony, where such persons deceased last Dwelt or Inhabited; which said Town Council, or the major part of them, shall have the Power, as Judge of Probates, to take the Probate of Wills and Testaments, and grant Administrations, and all other matters relating thereto, to Act and Do as by the Laws of *England*, and of his majesty's Colony doth belong to the said office.

And be it further enacted by the Authority aforesaid, That all Devises and Bequests of Land or Tenements, or of any Right or Interest in the same, shall be in writing, and Signed by the Party so devising the same, And shall be Attested and Subscribed in the Presence of the said Devisor, by three or four credible Witnesses, or else shall be Void and of none Effect.

And it be further Enacted by the Authority aforesaid, That the Town Council of each Town, may Summons and Convent before them, all and every Person named Executor or Executors, of any Testament, to the intent to prove or refuse the Testament of his or their Testator; And to bring in Inventories of such Testator's Estate; And in case such Person or Persons take upon him or them, the Executorship, by proving the Will, that then at the same time, such Executor or Executors, shall give Bond to the said Town Council, that within one month after such Probate, he or they will Exhibit a true and perfect Inventory upon Oath, of the whole Personal Estate of the Deceased, as far as shall come to his or their knowledge; And that he or they will add thereunto, what and so much as may afterwards appear.

. . . . . .

Public Laws of R. I., 1730, p. 5.

An Act Establishing Courts of Probate.

SECTION 1. *Be it enacted by the General Assembly, and by the Authority thereof it is enacted*, That the Town Councils in the several towns in this State be, and they hereby are, constituted Courts of Probate; and they, or the major part of them respectively, shall have full power and authority to take the probate of wills, to grant administration on the estates of persons deceased, being at the time of their decease inhabitants of, or residents in, the town to which such council may belong; and also to appoint guardians to minors, idiots, and persons *non compos mentis*, to examine, allow, and settle the accounts of executors, administrators, and guardians; and to do and transact all such matters and things as the Courts of Probate within the several towns shall by the laws of this State, have cognizance and jurisdiction of; and shall have power to issue such process as may be necessary for the discharge of the trust reposed in them.

. . . . . .

Public Laws of R. I., 1798, p. 276.

LAWS,

Made and passed by the General Assembly of his Majesty's Colony of *Rhode Island* and Providence Plantations held at *Newport*, the thirtieth of *April*, 1700.

An Act for *putting in force the laws of England* in all cases where no particular Law of this Colony hath provided a Remedy.

BE IT ENACTED *by the General Assembly and by the Authority of the same*, That in all *Actions*, Matters, Causes, and Things whatsoever, where *no particular Law* of this Colony is made to Decide and Determine the same; that then and in all such Cases the *Laws of England* shall be put in Force to Issue, Determine and Decide the same. Any Usage, Custom or Law to the Contrary hereof notwithstanding.

Public Laws of R. I., 1730, p. 42.

An Act establishing Courts of Probate.

SECTION 1. *Be it enacted by the General Assembly, and by the authority thereof it is enacted*, That the town councils in the several towns in the State be and they hereby are constituted courts of probate; and they, or the major part of them respectively, shall have full power and authority to take the probate of wills, to grant administration on the estates of persons deceased, being at the time of their decease inhabitants of or residents in the town to which such court of probate may belong; and also on the estates of persons who at the time of their decease were not inhabitants of or resident within this State at time of such decease; provided any of the rights, credits or estate of such deceased person shall be found therein; and the administration first granted shall be a bar to any other administration, although such deceased person may have left such rights, credits or estate in other towns; also, to appoint guardians to minors, idiots, and persons *non compos mentis;* to examine, allow and settle the accounts of executors, administrators and guardians; make partition of estates, and assign dower to widows, as prescribed by law; and to do and transact all such matters and things as the court of probate within the several towns shall by the law of this State have cognizance and jurisdiction of; and shall have power to issue such process as may be necessary for the discharge of the trust reposed in them.

. . . . . .

Public Laws of R. I., 1822, pp. 211, 212.

An Act providing for and directing the manner of filing and recording Wills, proved without this State.

SECTION 1.— *Be it enacted by the General Assembly, and by the authority thereof it is enacted*, That when the executor, or any other person interested in any will that has been proved and allowed in a court of probate in any of the United States, or in a court of probate in any other state or kingdom, shall

produce a copy of such will, with a copy of the probate thereof, under the seal of the court where the same will has been proved and allowed, unto any court of probate in any town in this state, where the testator had estate, real or personal, whereon the same will may operate, and shall in writing desire the same may be filed and recorded in the probate office in such town, pursuant to this act, the said court shall assign a time and place for taking the same into consideration, and shall cause notice thereof to be given in some public newspaper, printed nearest to the place where said court is to be holden, three weeks successively, the first publication whereof shall be thirty days at least before the time assigned, to the end that any person may appear and show cause against the filing and recording the same; and if at the time assigned, no objection is made, or none in the judgment of said court sufficient to prevent it, the said court may cause the same copy to be filed in the registry of said court of probate. and direct the same to be there recorded; saving always, an appeal to any person apprehending himself aggrieved thereby, to the supreme judicial court. as in other probate cases; and the said court may grant letters testamentary to the executor therein named, or to the administrator appointed under the original will, they giving bond according to law.

SEC. 2. And be it further enacted, That when the copy of any will which has been proved and allowed in any court of probate in any of the United States, or in any foreign state or kingdom, shall be directed to be filed and recorded in any probate court of this state, pursuant to this act, the filing and recording thereof shall be of the same force and effect as the filing and recording of an original will, proved and allowed in the said court of probate.

Public Laws of R. I., 1822, pp. 221, 222.

CHAPTER 155.

Of the Probate of Wills.

SECTION 1. No will shall be effectual to pass either real or personal estate, unless it has been duly proved and allowed in the court of probate; and the probate of a will devising real estate, shall be as conclusive as to its due execution, as in case of a will of personal estate.

. . . . . .

Revised Statutes of Rhode Island, 1857, p. 359.

CHAPTER 168.

. . . . . .

SEC. 3. The court of probate of any town may and shall take the probate of wills, and grant administration on the estates of deceased persons, who, at the time of their decease, were inhabitants of or residents in the Town, and of other persons not having any residence in this State, and who die without the State, leaving estate to be administered within such town.

. . . . . .

SEC. 5. Any such court may grant administration of the estates of persons who, at the time of their decease, were not inhabitants of or residents within this State, provided any rights, credits, or estate of such person be found within the State.

. . . . . .

General Statutes of R. I., 1872, p. 365.

EXTRACT FROM LAWS PASSED IN 1647.

"Champertors be such as move pleas and suits or cause them to be moved, eyther by their own procurement, or by others, and sue them at their proper costs, and for maintenance have that of land in variance, or the gains."

1 Colonial Records, p. 179.

LAWS,

Made and passed at a General Assembly of His Majesty's Colony of Rhode Island *and* Providence-Plantations *in* New England *begun* and held by Adjournment at South Kingstown, on the last Tuesday of February, A. D. 1749.

Whereas this Assembly, at their Session in October last, appointed a Committee to prepare a Bill for introducing into this Colony, such of the Statutes of England, as are agreeable to the Constitution, and make Report of their doings; the greater Part of whom presented what followeth;

We the Subscribers, being appointed to report what Statutes of Great Britain, are, and ought to be in Force in this Colony, do Report as followeth;

That the following STATUTES, viz.

. . . . . .

The Statutes of Thirty-second of *Henry* the Eighth, concerning Leases, saving and excepting the last Paragraph of the said Statute. The Statutes of Twenty-first of James First, Chap. 16th for limiting real Actions; and that of the Thirty-second of Henry the Eighth, Chap. 2d.

. . . . . .

All of which Statutes, we are humbly of Opinion, have heretofore been, and still ought to be in Force in this Colony.

D. UPDIKE,
J. HONYMAN, JUN.,
J. APLIN.

And this Assembly having taken the said Report into Consideration, Do Vote and Resolve, That all and every of the Statutes aforesaid, be, and they are hereby introduced into this Colony, and shall be in full Force therein, until the General Assembly shall order otherwise.

Public Laws of Rhode Island, of 1745, p. 70.

A LAW,

Made and passed at the General Assembly of the Colony of *Rhode Island* and *Providence Plantations*, held at Providence on the First Monday in *December*, A. D. 1766.

. . . . . .

An Act, regulating sundry Proceedings in the several Courts in this Colony.

Be it Enacted by the General Assembly, and by the Authority thereof it is enacted, That all the Courts in this Colony shall be held to, and governed by the Statutes, Laws, and Ordinances of this Colony and such Statutes of Parliament as are hereinafter mentioned, that is to say;

. . . . . .

The Statutes of { Thirty-second of *Henry* the Eighth, concerning Leases, saving and excepting the last Paragraph of the said Statute. The Thirty-second of *Henry* the Eighth, and that of the Twenty-first of *James* the First Chap. 16th, for limiting Real and Personal Actions.

. . . . . .

Public Laws of R. I., 1767, p. 55.

CHAPTER 260.

. . . . . .

Sec. 3. In all cases in which provision is not made herein, such English statutes, introduced before the Declaration of Independence, which have continued to be practiced under, as in force in this state, shall be deemed and taken as a part of the common law thereof, and remain in force until otherwise specially provided.

. . . . . .

General Sts. of 1872, p. 630.